

No. 14533

United States
Court of Appeals
For the Ninth Circuit.

RUTH B. KERRY,

Appellant,

VS.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy
of Harold Edwin Kerry and the Community of
Harold Edwin Kerry and Ruth B. Kerry, His
Wife, Bankrupts,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Southern Division.

FILED

JAN 26 1955

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature. errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Seattle 4, Washington.

For Appellee:

STANLEY J. KRAUSE,
Becker Building,
Aberdeen, Washington.

In the District Court of the United States for the
Western District of Washington, Southern Di-
vision

In Bankruptcy No. 15920

In the Matter of:

HAROLD EDWIN KERRY, and the Community
of HAROLD EDWIN KERRY and RUTH
B. KERRY, His Wife,

Bankrupt.

PETITION TO HAVE TRUSTEE ABANDON
BURDENSOME ASSET AND PERMIT PE-
TITIONER TO FORECLOSE PLEDGE

To: O. M. Pitzen, Referee in Bankruptcy:

Comes now Ruth B. Kerry, Petitioner, and re-
spectfully shows to this Court and petitions as fol-
lows:

1. Bankrupt above named is a partner in that
certain partnership known as "West Tenino Lum-
ber Co." The said partnership is engaged in busi-
ness in Thurston County, State of Washington, and
was organized on December 30, 1952. Bankrupt's
interest in said partnership, pursuant to the terms
of the partnership agreement, is a 45/88ths interest
therein. Bankrupt is now and at all times since
December 30, 1952, has been such partner.

2. The above-mentioned partnership acquired all
the assets and the business of a West Tenino Lum-
ber Company, a corporation, which corporation was
dissolved on December 31, 1952. The partners had

been the owners of shares of stock in the corporation, and their stock ownership was in the same proportions as the interests they acquired and now hold in the partnership. They acquired their said interests in the partnership as a consequence of the said dissolution of the corporation and the transfer from the corporation to the partnership of the said business and assets.

3. Prior to the dissolution of the corporation, to wit, on or about July 28, 1952, Bankrupt pledged all of his shares of stock in the corporation to Petitioner to secure a loan of \$29,250.00 made by Petitioner to Bankrupt upon the execution of the said pledge. By a written instrument executed December 30, 1952, Petitioner agreed to permit the said pledged shares of stock to be voted for said dissolution of the corporation, and Bankrupt pledged to Petitioner all of Bankrupt's partnership interest when it should come into existence, and agreed to execute an assignment of such partnership interest to further evidence the said pledge. A copy of the said instrument is attached hereto, marked "Exhibit A," and by this reference is incorporated herein. On December 30, 1952, Bankrupt did execute an assignment of his said partnership interest to petitioner. A copy of said assignment is attached hereto, marked "Exhibit B," and by this reference is incorporated herein. Said pledge and assignment have been in existence at all times since said dates.

4. Bankrupt is, as of the date of this petition, indebted to petitioner upon the obligation secured

by the said assignment and pledge in the sum of \$29,250.00, together with interest at the rate of 6% per annum from July 28, 1952.

5. The value of the partnership interest of Bankrupt is now, and has been at all times subsequent to the date of the filing of the Petition for Adjudication of Bankrupt in this cause, substantially less than the sums owing to Petitioner herein upon the obligation secured by the said pledge and assignment. The value of Bankrupt's said partnership interest as shown in the November 30, 1953, balance sheet of said partnership, is \$23,482.25. A copy of said balance sheet is attached hereto, marked "Exhibit C," and by this reference is incorporated herein. The reasonable market value of the said partnership interest is substantially less than the aforesaid balance sheet figures, because the said balance sheet figures are based upon cost of assets less depreciation (in accordance with normal accounting practices) rather than upon an appraisal based upon present reasonable market values.

6. There is no net value or equity for the bankrupt estate in the aforesaid partnership interest of Bankrupt.

Wherefore, Petitioner prays that an order be entered herein:

(a) Authorizing and directing the Trustee in Bankruptcy herein to abandon the aforesaid partnership interest of Bankrupt as an asset of the estate for the reason that it is of no value to the

estate and it would be burdensome to the estate to participate in any foreclosure of Petitioner's pledge and assignment of said partnership interest;

(b) Permitting Petitioner to acquire by assignment and bill of sale from Bankrupt all of Bankrupt's right and title in and to the said partnership interest (or in lieu thereof, if Bankrupt fails or refuses to execute such assignment and bill of sale, to foreclose said pledge and assignment in a court other than this Court of Bankruptcy, without any necessity of joining the said Trustee as a party to such action); and

(c) Granting Petitioner such other and further relief as this Court deems just.

BOGLE, BOGLE & GATES,
Attorneys for Ruth B. Kerry,
Petitioner.

Duly verified.

EXHIBIT A

Agreement

This Agreement, made and entered into this 30th day of December, 1952, by and between Harold E. Kerry, herein called "Assignor," and Ruth B. Kerry, hereinafter called "Assignee,"

Witnesseth:

Whereas, on the 28th day of July, 1952, Assignor, being indebted to Assignee in the sum of Twenty-nine Thousand Two Hundred Fifty Dollars (\$29,-250), assigned to Assignee, as security for his note in said sum, Stock Certificate No. 70 for 90 shares of the common stock of West Tenino Lumber Company and Stock Certificate No. 10 for 135 shares of the stock of West Tenino Lumber Company; and

Whereas, it is the desire of the shareholders of West Tenino Lumber Company to dissolve said corporation; and

Whereas, Assignee is willing to allow the dissolution of said corporation provided that her security interest will be protected;

Now, Therefore, it is Mutually Agreed as follows:

1. Assignee does hereby authorize Assignor to vote his stock for the dissolution of West Tenino Lumber Company, a Washington corporation, provided that said dissolution and transfer of assets to the partnership is to be performed simultaneously therewith and the partnership is to be known as West Tenino Lumber Company.

2. Simultaneously with the release of said

pledge, Assignor shall execute an assignment to Assignee of all of his right, title and interest in said partnership as additional security for the payment of said promissory note, dated July 28, 1952, in the sum of \$29,250.

In Witness Whereof the parties hereto have caused this agreement to be executed the day and year first above written.

/s/ HAROLD E. KERRY,
Assignor.

/s/ RUTH B. KERRY,
Assignee.

State of Washington,
County of King—ss.

I, the undersigned, Notary Public in and for the State of Washington, do hereby certify that on this 30th day of December, 1952, personally appeared before me H. E. Kerry and Ruth B. Kerry, to me known to be the individuals described in and who executed the within instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and Official Seal this 30th day of December, 1952.

/s/ G. N. BENNETT,
Notary Public in and for the State of Washington,
Residing at Olympia.

EXHIBIT B

Assignment

H. E. Kerry does hereby assign and set over to Ruth B. Kerry all of his right, title and interest in and to the partnership known as West Tenino Lumber Company, which is a partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico. Said assignment is substituted security for that certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28, 1952, and which security is to act as continuing security for that certain note, dated July 28, 1952, until said note is paid in full.

Dated this 30th day of December, 1952.

/s/ H. E. KERRY.

EXHIBIT C

West Tenino Lumber Co.
Balance Sheet
November 31, 1953

Assets

Current Assets

Capital Br. Natl. Bank of Com.

\$ 26.60

Fixed Assets

Leasehold improvements

Cost
\$40,448.58

Dep. Res.
\$ 2,247.06

Net Value
\$38,201.52

Office building

1,874.81

55.44

1,819.37

Drying shed

702.47

6.00

696.47

Machinery and equipment

9,997.78

1,222.18

8,775.60

Fork Lift and carrier

4,559.60

2,089.74

2,469.86

Office equipment

282.70

55.44

227.26

Other Assets

Prepaid insurance

\$57,865.94

\$ 5,675.86

\$52,190.08

Miscellaneous receivables

\$ 1,586.02

\$ 1,689.54

Total assets

\$53,906.22

Ruth B. Kerry vs.

[Title of District Court and Cause.]

PETITION OF TRUSTEE TO HAVE REFEREE DETERMINE TITLE TO PROPERTY AND REQUIRE PERSONS IN POSSESSION TO TURN PROPERTY OVER TO TRUSTEE

To: O. M. Pitzen, Referee in Bankruptcy:

Comes now Joseph R. Schneider, Trustee, and respectfully shows to this court and petitions as follows:

1. Trustee denies each and every allegation contained in the petition of Ruth B. Kerry to have trustee abandon burdensome asset and permit petitioner to foreclose pledge.

2. That Harold Edwin Kerry and Ruth B. Kerry now are, and at all times material to this petition were, husband and wife.

3. That any and all pledges, assignments, promissory notes, or contracts alleged by Ruth B. Kerry to have been executed by Harold Edwin Kerry were made by the said parties when Harold Edwin Kerry and the marital community composed of Harold Edwin Kerry and Ruth B. Kerry were insolvent, and the same were made or executed without a fair consideration being paid.

4. That Harold Edwin Kerry and/or Ruth B. Kerry are now in possession of the following-described personal property which is not exempt by law and which said property at the time of the

filing of the petition for bankruptcy herein, was owned by Harold Edwin Kerry and/or the community of Harold Edwin Kerry and Ruth B. Kerry, said property being described as follows:

Household furniture and furnishings not set forth and described in Trustee's report on exemptions filed herein.

1947 Cadillac automobile,

1948 Chevrolet automobile.

5. That the schedules herein which are signed by Ruth B. Kerry are made a part hereof by this reference. That there are creditors of the same class as Ruth B. Kerry and that the effect of the pledges, assignments, promissory notes or contracts set forth by Ruth B. Kerry in her petition would be to give to Ruth B. Kerry a greater percentage of her claim than other creditors of the same class. That if any pledge or assignment was executed, as alleged by Ruth B. Kerry in her petition, the same was not completed within four months before the filing of the petition for adjudication as a bankrupt herein.

Wherefore, trustee prays that an order be entered herein:

(a) Determining the right, title or interest of Ruth B. Kerry and the Trustee in and to the alleged partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico, and the alleged pledge of property as set forth in the petition of Ruth B. Kerry.

(b) Determining the right, title or interest of

Ruth B. Kerry and the trustee in and to the following-described personal property:

Household furniture and furnishings not set forth and described in Trustee's report on exemptions filed herein.

1947 Cadillac automobile.

1948 Chevrolet automobile.

(c) Requiring Ruth B. Kerry and Harold Edwin Kerry to execute such papers as are necessary to transfer title to the above-described property to the trustee in bankruptcy.

(d) Requiring Ruth B. Kerry and Harold E. Kerry to turn over to the trustee such property as the referee determines is not exempt by law and is a part of the bankrupt estate herein.

(e) Granting Trustee such other and further relief as is deemed just.

/s/ STANLEY J. KRAUSE,
Attorney for Trustee.

Duly verified.

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

REPLY OF RUTH B. KERRY TO PETITION
OF TRUSTEE TO HAVE REFEREE DE-
TERMINE TITLE TO PROPERTY

To O. M. Pitzen, Referee in Bankruptcy:

Comes now Ruth B. Kerry, and replies to the petition served by the trustee herein on February 27, 1954, and entitled, "Petition of Trustee to Have Referee Determine Title to Property and Require Persons in Possession to Turn Property Over to Trustee."

For answer to paragraph 2, admits the same.

For answer to paragraph 3, denies each and every allegation contained therein, and particularly, and without limiting the generality of the foregoing, denies that pledges, assignments, promissory notes and agreements, or any thereof, were made or executed without fair consideration being paid, and specifically allege that all such pledges, assignments, promissory notes and agreements were made with respect to loans of moneys to Harold Edwin Kerry, the above-named bankrupt.

With respect to paragraph 4, denies each and every allegation thereof.

With respect to paragraph 5, denies each and every allegation thereof.

Wherefore, Ruth B. Kerry prays that an order

be entered granting her the relief requested in her petition of January 21, 1954, filed in this cause.

BOGLE, BOGLE & GATES,
Attorneys for Ruth B. Kerry.

Duly verified.

[Endorsed]: Filed March 15, 1954.

[Title of District Court and Cause.]

PROOF OF CLAIM IN BANKRUPTCY

State of Washington,
County of King—ss.

Ruth B. Kerry, being first duly sworn on oath, deposes and says:

1. That she is the Claimant herein, and resides at 201 West 14th Avenue, Olympia, Washington.

2. That the above-named Bankrupt was at and before the filing by him of the petition herein, and still is, and justly and truly indebted to Deponent in the sum of thirty-one thousand three hundred eighty-nine and 11/100ths (\$31,389.11) dollars for loans and advances to Bankrupt from a separate property of the Deponent; and that Bankrupt was at and before the filing of the petition herein and still is, justly and truly indebted to the Deponent in the sum of ten thousand six hundred seventy-seven and 76/100ths (\$10,677.76) dollars upon a promissory note, dated August 1, 1951, and executed by Olympic Stud Mill, Inc., and by Bankrupt, as

co-makers, for a loan in the said sum made by Deponent to the said Owner of Olympic Stud Mill, Inc., from separate funds of Deponent.

3. That the consideration of said debt is loans made by Deponent from her own separate funds to Bankrupt as follows:

October 27, 1948—Pursuant to promissory note attached hereto—loan of \$15,000.00 with interest thereon of 10%, on which balance owing is \$12,800.00, together with interest thereon from October 27, 1948, until paid.

April 11, 1949—Loan of \$1,089.11, no part of which has been paid, all of which is payable together with interest at 6% per annum from the date thereof until paid.

April 10, 1951—\$5,000.00 pursuant to promissory note attached hereto, no part of which is paid, all of which is due and payable together with interest at 6% per annum from date until paid.

February 26, 1951—Loan of \$5,000.00, no part of which has been paid, all of which is payable together with interest at 6% per annum from the date thereof until paid.

December 26, 1951—Loan of \$5,000.00, no part of which has been paid, all of which is payable, together with interest at 6% per annum from December 26, 1951, until paid.

April 17, 1953—Loan of \$2,500.00, no part of which has been paid, all of which is payable to-

gether with interest at 6% per annum from April 17, 1953, until paid.

Liability on aforesaid note of August 1, 1951, executed by Olympic Stud Mill, Inc., and the Bankrupt in the sum of \$10,677.76, all of which is due and payable, which note is filed with the receiver of Olympic Stud Mill, Inc., together with a credit owner's claim thereon.

4. That no part of said debt or liability has been paid except as above set forth.

5. That there are no set-offs or counterclaims to the said debt or liability.

6. That Deponent does not hold and has not, nor has any person by her order or to Deponent's knowledge or belief, or for her use, had or received any security or securities for said debt or liability. (The debts and liabilities above set forth are in addition to a secured obligation owing by Bankrupt to Deponent in the sum of \$29,250.00, upon a promissory note of July 28, 1952, secured by an assignment of a partnership interest of Bankrupt, and no claim is made herein with respect to the aforesaid note of July 28, 1952, for the reason that it is a secured note and Deponent is relying upon the security thereof.)

7. That the instruments (to wit: The promissory notes of October 27, 1948, and April 10, 1951), referred to above are attached hereto.

8. That the sums owing on the loans included in this debt became due upon the dates hereinabove

set forth; no note or other negotiable instrument has been received for such account or any part thereof except as hereinabove referred to; and that no judgment has been rendered thereon.

9. This claim is filed as an unsecured claim provided, however, that Deponent is expressly reserving her rights under the note of July 28, 1952, and the security therefore, and said note and said security are not made a part of this claim but are expressly reserved by the Deponent.

/s/ RUTH B. KERRY.

Subscribed and sworn to before me this 20th day of April, 1954.

[Seal] /s/ G. M. BENNETT,
Notary Public in and for the State of Washington,
Residing at Olympia.

Name: H. E. Kerry.

Due: Oct. 27, 1949.

Seattle, Washington, Oct. 27, 1948 \$15,000.00

One year after date, I promise to pay to the order of (Mrs.) Ruth B. Kerry, at Seattle, Fifteen Thousand and no/100 Dollars, for value received, with interest thereon at the rate of 10 per cent per annum from Oct. 27, 1948, until paid, interest payable monthly. Principal and interest payable in Lawful Money of the United States. For value re-

ceived, each and every party to this note binds himself, jointly and severally, hereon as principal and not as surety, and all parties hereto, including indorsers, sureties, and guarantors, hereby severally waive presentment, demand, protest, notice of non-payment hereof, any release or discharge arising from any extension of time, discharge of a prior party, or other cause other than actual payment in full hereof, and promises, in case suit is instituted to collect the same or any portion hereof, to pay such sum as the Court may adjudge reasonable in such suit as attorneys fees. At the option of the holder, the venue of any such suit may be laid in King County, Washington.

/s/ H. E. KERRY.

P. O. Address: 3301 White Bldg.

Tel. No.:

Date Paid: Nov. 12, 1951.

Interest Principal Pd.....\$ 1,000

Bal. of Principal..... 14,000

Date Paid: May 26, 1953.

Interest Principal Pd..... 1,200

Bal. of Principal..... 12,800

Bank No. Due on Demand, Seattle, Wash.,
April 10, \$5,000.00.

On demand, for value received, I promise to pay to the order of Ruth B. Kerry at the Seattle-First National Bank, at its Metropolitan Branch, Fourth Avenue and Union Street, Seattle, Washington, Five Thousand and no/100 Dollars with interest thereon from April 10, 1951, until paid at the rate of 6 per cent per annum, and if said principal and interest are not paid when this note becomes due; the interest shall then, and thereafter quarterly, be added to the principal sum and become a part of said principal, and said principal shall thereafter bear interest at the same rate. For value received, each and every party signing or indorsing this note waives presentment, demand, protest, and notice of non-payment thereof, binds himself as a principal, not as a surety, and promises to pay all costs of collection in case payment shall not be made at maturity; and further promises, in case suit is instituted to collect the same or any portion thereof, to pay such additional sum as the court may adjudge reasonable, as attorney's fees in such suit, and that at the option of the holder hereof the venue of said suit may be laid in King County, Washington.

H. E. KERRY CO.,

By /s/ H. E. KERRY.

Address: 3303 White Bldg., Seattle 1, Wash.

[Endorsed]: Filed April 20, 1954.

[Title of District Court and Cause.]

MEMORANDUM DECISION

Harold Edwin Kerry and the community of Harold Edwin Kerry and Ruth B. Kerry, his wife, filed their Petition in Bankruptcy on the 2nd day of October, 1953, and were adjudicated as such on the 5th day of October, 1953.

Prior to the filing of the Petition, the bankrupt, Harold Edwin Kerry, was a partner in a firm known as "The West Tenino Lumber Company" and owned a 45/88ths interest therein. The partnership was organized on December 30, 1952, on the same date that a corporation of the same name was dissolved. The partnership acquired all of the assets of the corporation and the shareholders became partners. Six months prior to the dissolution of the corporation, the petitioner, Ruth B. Kerry, made a cash loan of \$29,250.00 to the bankrupt, Harold Edwin Kerry, and bankrupt executed a promissory note and a pledge of his shares of stock to petitioner. On the date of the dissolution of the corporation, December 30, 1952, petitioner and bankrupt executed an agreement whereby petitioner permitted the pledged shares in "The West Tenino Lumber Company" to be voted in favor of a dissolution, in consideration of the simultaneous execution of the partnership agreement and the assignment to petitioner of bankrupt's interest as security for the \$29,250.00 loan. On the same day as the dissolution of the corporation was effected, the partnership

agreement was executed and the bankrupt executed the assignment of his partnership interest to petitioner in place and stead of his shares of stock in the former corporation, said assignment being as follows:

“Assignment

“H. E. Kerry does hereby assign and set over to Ruth B. Kerry, all of his right, title and interest in and to the partnership known as West Tenino Lumber Company, which is a partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico. Said assignment is substituted security for that certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28, 1952, and which security is to act as continuing security for that certain note, dated July 28, 1952, until said note is paid in full.

“Dated this 30th day of December, 1952.

“H. E. KERRY.”

No notice thereof was filed with either the County Auditor or the Secretary of State. All of the partners had actual notice of the pledge of bankrupt's interest in said partnership to Ruth B. Kerry, his wife, to secure the loan of \$29,250.00.

It is conceded that the loan was from Ruth B. Kerry's separate funds acquired by her from the estate of her former husband never commingled with the community property of petitioner and bankrupt. It is also admitted that the value of the partnership interest of the bankrupt at the date of filing of the

petition, and at all times since, has not exceeded \$22,000.00 and that no part of the principal or interest has been repaid.

The question to be determined is whether, under the strong-arm clause of the Bankruptcy Act, said assignment has any validity against the Trustee in Bankruptcy.

The above assignment cannot be deemed a mortgage as the same has no good faith affidavit nor was the same properly recorded within 10 days.

To be a valid pledge against a Trustee in Bankruptcy, the property pledged must be delivered to or the pledgee placed in possession of the pledged property. In *Hastings v. Lincoln Trust Company*, 115 Wash. 492, on page 499, the Court indicated that in such cases the security may be valid as between the parties but void as to the creditors of the debtor.

The Court said:

“It is elementary law that the delivery of pledged property by the pledgor to the pledgee is absolutely necessary to the life of the contemplated pledge. It is well said in *Security Warehousing Co. v. Hand*, 143 Fed. 32 (41):

“‘Delivery of possession is the very life of a pledge. No mere agreements respecting possession can create it. The contract of pledge cannot exist outside of the fact of change of possession.’ 21 R.C.L. 643.

“It is, of course, not necessary, under all circumstances, that the delivery be an actual

physical movement of the property from the hands or control of the pledgor to the pledgee; but it must in any event be of such nature that the control and dominion over the property passes from the pledgor into the absolute control and dominion of the pledgee. * * *

In *Kietz v. Gold Point Mines, Inc.*, 5 Wash. (2d), page 229, the Court said:

(1) "In passing upon the question of necessity of delivery of personal property to complete a pledge, this Court stated in *Kuhn v. Groll*, 118 Wash. 285, 203 Pac. 44:

"It is true that the law requires a delivery of the pledged property from the pledgor to the pledgee and a retention of it by the pledgee in order to make the pledge fully effectual as security. We think the law applicable to the situation we find here is well stated in 21 R.C.L. 643, as follows:

"The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception, for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. If, however, the pledgee has the thing already in his possession, the very contract transfers to him, by operation of law, a virtual possession thereof as a pledge the moment the contract is completed.'

“Of like import, see *Hastings v. Lincoln Trust Co.*, 115 Wash. 492, 197 Pac. 627, 18 A.L.R. 583; *Bank of California v. Danamiller*, 125 Wash. 255, 215 Pac. 321, 36 A.L.R. 753; *Qualley v. Snoqualmie Valley Bank*, 136 Wash. 42, 238 Pac. 915; *Hodge v. Truax*, 184 Wash. 360, 51 P. (2d) 357, 103 A.L.R. 420.”

In the instant case, the pledgee, Ruth B. Kerry, was not placed in possession of any property whatsoever, except the pledge agreement, and she exercised no dominion or control over any of the property. The alleged pledgor continued to act as managing partner, the same as though the pledge had not been given, nor was the name of Ruth B. Kerry placed on the books of the partnership, or the alleged pledge filed with the partnership. However, the partners had oral knowledge of its existence. The pledgee not having any property in her possession or control, the alleged pledge is void as to a Trustee in Bankruptcy.

No case has been cited involving an attempted pledge of a partnership interest and defendant argues that the pledge in this case is similar to a pledge of an account receivable which our Supreme Court has recognized as valid although the pledgee was not placed in possession of the property pledged or an indispensable instrument representing the same.

R.C.W. 25.04.260, Nature of Partner's Interest in the Partnership. “A partner's interest in the partnership is his share of the profits

and surplus, and the same is personal property."

R.C.W. 25.04.270, Assignment of Partner's Interest.

(1) "A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignees, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled."

R.C.W. 63.16.010, Definitions.

(2) "'Assignment' shall include any transfer, pledge, mortgage, or sale of an account."

(1) "'Account' or 'Account Receivable' means an open book account, mutual account, or account stated, due or to become due, and not represented by a judgment, note, draft, acceptance, or other similar instrument for the payment of money; it includes rights under an unperformed contract written or oral for work, goods, or services which in the regular course will result in an account receivable; it excludes conditional sales contracts."

(6) “‘Filing Officer’ means the Secretary of State.”

R.C.W. 63.16.030, Notice of Assignment—Filing. “No assignment of an account shall be valid as against present or future creditors of the assignor, or as against a subsequent assignee of such account without knowledge of such assignment, unless such assignment shall be in writing and be signed by the assignor, and unless there shall be on file in the office of the filing officer, at the time of the making of such assignment or within ten days thereafter, an effective and uncanceled notice signed by the assignor and the assignee, in substantially the following form. * * *”

It appears that, under our Statute, the only assignable interest of a partner is his right to share in the profits and, upon dissolution, the proceeds, which is in reality “Ejusdem Generis,” an account receivable and, therefore, notice of said assignment, not having been filed with the Secretary of State, is void as to the Trustee.

An Order, after notice properly presented, will be entered sustaining Trustee’s Petition invalidating the pledge of Ruth B. Kerry as to the Trustee.

Dated at Tacoma in said District this 11th day of May, 1954.

/s/ O. M. PITZEN,
Referee in Bankruptcy.

[Endorsed]: Filed May 11, 1954.

[Title of District Court and Cause.]

MOTION ON BEHALF OF RUTH B. KERRY
FOR REHEARING

To the Honorable O. M. Pitzen, Referee in Bankruptcy:

Comes now Ruth B. Kerry, by Bogle, Bogle & Gates, her attorneys of record herein, and moves that the Referee reconsider her petition to have the Trustee abandon burdensome assets and to permit her to foreclose upon the security assignment of a certain partnership interest, and moves for a rehearing and reargument with respect thereto.

BOGLE, BOGLE & GATES,

/s/ ARTHUR G. GRUNKE,
Attorneys for Petitioner,
Ruth B. Kerry.

[Endorsed]: Filed May 14, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This case came on for hearing before the undersigned Referee in Bankruptcy of the above-entitled Court, on the 18th day of March, 1954, upon the petition of Ruth B. Kerry to have the Trustee abandon the partnership interest of the bankrupts in The West Tenino Lumber Company, a partner-

ship, as an asset of the Estate, and the petition of the Trustee in Bankruptcy to have the Referee determine the interest of Ruth B. Kerry and the Trustee in The West Tenino Lumber Company, and the petitioner, Ruth B. Kerry, being present and represented by her attorney, Arthur G. Grunke, of Bogle, Bogle & Gates, and the Trustee in Bankruptcy being present and represented by his attorney, Stanley J. Krause, and witnesses having been sworn and testimony taken, and the Court being fully advised in the premises,

Now, Therefore, the Referee in Bankruptcy makes the following

Findings of Fact

I.

That Harold Edwin Kerry and the community of Harold Edwin Kerry and Ruth B. Kerry, his wife, filed their petition in bankruptcy herein on the 2nd day of October, 1953, and Harold Edwin Kerry and the said community was adjudicated bankrupt on the 5th day of October, 1953.

II.

That Joseph R. Schneider was duly appointed Trustee of the Estate of said bankrupt and on the 18th day of November, 1953, an order was signed approving the bond of Joseph R. Schneider as Trustee.

III.

That at the time of their filing of the petition in bankruptcy herein, the debts of the bankrupt

totalled \$148,153.14, and assets of the bankrupt totalled \$39,974.89. That one of the assets of the bankrupt at the time of the filing of the petition in bankruptcy herein was a 45/88ths interest in a partnership known as The West Tenino Lumber Company, which said interest at the time of the filing of the petition in bankruptcy was of the reasonable value of \$22,000.00, and which interest is now of the reasonable market value of \$22,000.00.

IV.

That on the 28th day of July, 1952, H. E. Kerry, in behalf of the marital community composed of H. E. Kerry and Ruth B. Kerry, his wife, borrowed \$29,250.00 from Ruth B. Kerry. That said loan was evidenced by a promissory note dated the 28th day of July, 1952, in the amount of \$29,250.00, payable to the order of Ruth B. Kerry and signed by H. E. Kerry. That the said sum of \$29,250.00 loaned by Mrs. Kerry, as aforesaid, was obtained by her from her own separate property, acquired from the estate of her former husband. No part of said loan has been repaid.

V.

That on the 28th day of July, 1952, H. E. Kerry, in behalf of the marital community, signed an agreement pledging certificates of stock in The West Tenino Lumber Company, a corporation, and pledging certain shares of stock of the Olympic Stud Mill, Inc., as security for the payment of the promissory note in the amount of \$29,250.00.

VI.

That on the 30th day of December, 1952, Harold Edwin Kerry and Ruth B. Kerry entered into a written agreement authorizing Harold Edwin Kerry to vote the pledged stock for the dissolution of the corporation, provided that the dissolution be simultaneous with a transfer of the corporate assets to a partnership to be known as The West Tenino Lumber Company. That said written agreement further provided that, simultaneous with the release of said pledge, H. E. Kerry shall execute an assignment to Ruth B. Kerry of all of his right, title and interest in The West Tenino Lumber Company, a partnership, as additional security until the payment of the promissory note in the amount of \$29,250.00.

VII.

That The West Tenino Lumber Company, a corporation, was dissolved and the corporate assets were transferred by bill of sale to the shareholders, namely, Harold Edwin Kerry, Charles L. Stickney, H. A. Preszler and Israel Torrico on the 30th day of December, 1952. That the bill of sale was filed in the office of the Auditor of Thurston County, Washington.

VIII.

That on the 30th day of December, 1952, simultaneously with the aforesaid dissolution and transfer of assets, a partnership agreement was executed between H. E. Kerry, Charles L. Stickney, H. A. Preszler and Israel Torrico, under the firm name of West Tenino Lumber Company, for the opera-

tion of a lumber business, and owning and operating the properties formerly owned by the corporation. That the properties of the partnership included a lumber mill in Tenino, Washington. That the partnership interests of the partners were in the same proportions to one another as was their ownership of stock in the corporation. The partnership agreement provided that H. E. Kerry owned 45/88ths of the capital and he was to share in the profits and losses of said proportion. The agreement named H. E. Kerry as managing partner and he was made responsible for the general management of the business. The partnership agreement provided that, in the event of the death of any partner, the partnership shall immediately terminate and the business transferred to a corporation, to be formed. The partners agreed that the estate of the deceased partner was to accept a proportionate share of the capital stock of the corporation in complete settlement of the deceased's account in the partnership. It was agreed that the common stock of the corporation was to be distributed to the partners, including the interest of the deceased partner, in the proportion in which the capital of the partnership is owned by the partners at the date of such transfer.

IX.

That on the 30th day of December, 1952, simultaneously with the aforesaid dissolution and transfer of assets, H. E. Kerry signed the following instrument, to wit:

“Assignment

“H. E. Kerry does hereby assign and set over to Ruth B. Kerry all of his right, title and interest in and to the partnership known as West Tenino Lumber Company, which is a partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico. Said assignment is substituted security for that certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28, 1952, and which security is to act as continuing security for that certain note dated July 28th, 1952, until said Note is paid in full.

“Dated this 30th day of December, 1952.

“/s/ H. E. KERRY.”

That the said instrument was executed and delivered pursuant to the aforesaid agreement of the same date, namely, December 30th, 1952, referred to in Paragraph VI above, and in consideration of the agreement to substitute the quoted instrument for the pledge of the Stock of this aforesaid corporation, The West Tenino Lumber Company, and in consideration further of the release of the Capital Stock of Olympic Stud Mill, Inc., from the pledge of July 28th, 1952. That on the 31st day of December, 1952, a Certificate of Firm Name was filed in the Office of the County Clerk of Thurston County, Washington, naming H. E. Kerry, Charles L. Stickney, H. A. Preszler and Israel Torrico as partners in The West Tenino Lumber Company. That no notice of the quoted instrument was filed with either

the County Auditor or the Secretary of State of the State of Washington. That the said Charles L. Stickney was advised, prior to the dissolution of the corporation, of the pledge of the said corporate stock, and the said Charles L. Stickney knew of the substitution of the substitution of the quoted instrument for the pledge of the said Capital Stock of The West Tenino Lumber Company.

X.

That Ruth B. Kerry was not placed in possession of any partnership property whatsoever, except the instrument quoted in Paragraph IX, and she exercised no dominion or control over any of the partnership property or any partnership interest of Harold E. Kerry. Harold E. Kerry acted as managing partner of the partnership. The name of Ruth B. Kerry was not placed on any of the books or records of the partnership, nor was the instrument quoted in Paragraph IX filed with the partnership.

XI.

That no instrument was filed in the Office of the Secretary of State of the state of Washington or in any office of the County Auditor or County Clerk of any county in the State of Washington showing that Ruth B. Kerry had a right, title or interest in The West Tenino Lumber Company, a partnership.

XII.

That the books of account of The West Tenino Lumber Company, a partnership, at all times showed that H. E. Kerry owned a 45/88ths interest

in the partnership, and from the above findings of fact, the Referee makes the following

Conclusions of Law

I.

That the interest of Harold Edwin Kerry, Harold E. Kerry or H. E. Kerry in the partnership known as The West Tenino Lumber Company is an asset of the bankrupt estate.

II.

That the unfiled instrument signed by H. E. Kerry on December 20th, 1952, purporting to set over a partnership interest in The West Tenino Lumber Company to Ruth B. Kerry is an incomplete pledge of an open book account and is not effective as against Trustee in Bankruptcy herein and the Trustee takes title to the said partnership interest free of any rights of Ruth B. Kerry under said instrument.

III.

That the 45/88ths interest of the bankrupt in the partnership doing business as The West Tenino Lumber Company is not a burdensome asset of the estate herein, and the petition of Ruth B. Kerry should be denied.

IV.

That upon dissolution of the partnership, doing business as The West Tenino Lumber Company, Joseph R. Schneider, as Trustee in Bankruptcy, is entitled to receive all right, title and interest in assets distributed as the result of the 45/88ths in-

terest appearing on the books and records of the partnership in the name of Harold Edwin Kerry, Harold E. Kerry or H. E. Kerry.

V.

That the effect of granting of Ruth B. Kerry's petition recognizing that she has a right, title or interest in The West Tenino Lumber Company, a partnership, in this proceeding would be to enable Ruth B. Kerry to obtain a greater percentage of her debt than some other creditor of the same class.

Done in Open Court this 11th day of June, 1954.

/s/ O. M. PITZEN,

Referee in Bankruptcy.

Presented by:

/s/ STANLEY KRAUSE.

It is stipulated that the foregoing may be entered forthwith and without further notice.

Dated June 10, 1954.

BOGLE, BOGLE & GATES,

Attorneys for Ruth B. Kerry.

[Endorsed]: Filed June 11, 1954.

In the District Court of the United States for the
Western District of Washington, Southern Division

In Bankruptcy No. 15920

In the Matter of:

HAROLD EDWIN KERRY, and the Community
of HAROLD EDWIN KERRY and RUTH B.
KERRY, His Wife,

Bankrupt.

ORDER

At Tacoma, in said District, on the 11th day of
June, 1954:

Ruth B. Kerry having filed her petition to have the Trustee abandon the partnership interest of the bankrupts in the West Tenino Lumber Company, a partnership, as an asset of the estate, and the Trustee having filed his petition to have the Referee determine the interest of Ruth B. Kerry and the trustee in the West Tenino Lumber Company, a partnership, and a hearing upon said petitions having been had whereat Ruth B. Kerry was present and represented by her attorney, Arthur G. Grunke, of Bogle, Bogle & Gates, and the trustee was present and represented by his attorney, Stanley J. Krause, and witnesses having been sworn and testimony taken, and the Referee having heard and considered the evidence, having made a Memorandum Decision, Findings of Fact and Conclusions of Law, now, therefore,

It Is Now Ordered:

I.

That the petition of Ruth B. Kerry be denied.

II.

That all right, title and interest in the partnership known as the West Tenino Lumber Company, appearing in the records of the partnership in the name of Harold Edwin Kerry, Harold E. Kerry or H. E. Kerry, is an asset of the bankrupt estate.

III.

That Ruth B. Kerry has no right, title or interest in the 45/88ths interest in the partnership known as the West Tenino Lumber Company appearing in the records of the partnership in the name of Harold Edwin Kerry, Harold E. Kerry, or H. E. Kerry.

IV.

That upon dissolution of the partnership doing business as West Tenino Lumber Company, Joseph R. Schneider as trustee in bankruptcy, is entitled to receive all right, title and interest in assets to be distributed as the result of the 45/88ths interest appearing on the books and records of the partnership in the name of Harold Edwin Kerry, Harold E. Kerry or H. E. Kerry.

Done in Open Court this 11th day of June, 1954.

/s/ O. M. PITZEN,

Referee in Bankruptcy.

Presented by:

/s/ STANLEY J. KRAUSE,

Attorney for Trustee.

It is stipulated that the foregoing may be entered forthwith and without further notice.

Dated June 10, 1954.

BOGLE, BOGLE & GATES,
Attorneys for Ruth B. Kerry.

[Endorsed]: Filed June 11, 1954.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To O. M. Pitzen, Referee in Bankruptcy:

The petition of Ruth B. Kerry respectfully represents:

1. Your petitioner is aggrieved by the Order herein of O. M. Pitzen, Referee in Bankruptcy, entered June 11, 1954, a copy of which Order is annexed hereto, marked Exhibit "A" and made a part hereof, and by the Findings of Fact and Conclusions of Law entered on the same date, in connection with the said Order, a copy of which Findings of Fact and Conclusions of Law is attached hereto, marked Exhibit "B," and made a part hereof.

2. The Referee erred in respect to the said Findings of Fact, Conclusions of Law, and Order, in the following particulars:

(a) In stating in finding of fact number III that, at the time of the filing of the Bankruptcy

Petition herein, the assets of the bankrupt totalled \$39,974.89, and that one of said assets of the bankrupt was a 45/88ths interest in a partnership known as The West Tenino Lumber Company (which conclusion is not supported by the record herein and is contrary to the remaining findings of fact, which establish that the said partnership interest was assigned to petitioner; and which, furthermore, is a conclusion of law, and not properly a finding of fact); and in stating in the said finding of fact number III that the value of the said 45/88ths interest as of the date of the filing of the Bankruptcy Petition was \$22,000.00.

(b) In making conclusion of law number 1, stating that the interest of Harold Edwin Kerry in the said partnership is an asset of the bankrupt estate, for the reason that the said conclusion of law is contrary to the findings herein which establish that said interest was assigned to petitioner.

(c) In making conclusion of law number II, stating that the assignment of the said partnership interest is an incomplete pledge of an open book account and not effective as against the Trustee in Bankruptcy herein, and that the Trustee takes title to the said partnership interest free of any rights of Ruth B. Kerry, for the reason that the said conclusions are contrary to the findings of fact herein which establish that the transaction was not a pledge of an account receivable, but an assignment of partnership interest to petitioner.

(d) In making conclusion of law number III, stating that the 45/88ths interest of the bankrupt in the partnership is not a burdensome asset of the estate and that the petition of Ruth B. Kerry should be denied, for the reason that the findings of fact establish that the said petition should be granted, and that the debt secured by said assignment exceeds the value of said partnership interest, and there is no asset value in the said partnership interest for the estate herein; and for the reason that the said conclusions are not supported by the findings of fact nor by the record herein.

(e) In making conclusion of law number IV, stating that, upon the dissolution of the aforesaid partnership, the Trustee in Bankruptcy herein is entitled to receive all of the right, title and interest in assets distributed as a result of liquidation of the 45/88ths interest which Harold Edwin Kerry had assigned to petitioner, Ruth B. Kerry, for the reason that the findings of fact establish that Ruth B. Kerry is entitled, by virtue of the assignment and the Uniform Partnership Act, to the assets or proceeds of the said 45/88ths interest until she has received the sum of \$29,250.00, together with the interest on the note evidencing the same, and such other relief as the note provides, that the said 45/88ths interest is of a lesser value than the said sum of \$29,250.00, and that the Trustee consequently has no interest therein; and for the reason that the said conclusions are not supported by the findings of fact nor the record herein.

(f) In making conclusion of law number V, stating that the effect of granting the Petition of Ruth B. Kerry recognizing her rights under the assignment of the said partnership interest would be to enable her to obtain a greater percentage of her debt than some other creditor of the same class, for the reason that the assignment of the partnership interest conveyed to the said Ruth B. Kerry a property right and made her a secured creditor, and for the further reason that there are no findings of fact and there is nothing in the record herein to support any such conclusions as appear in conclusion of law number V.

3. The Referee erred in failing to enter conclusions of law stating substantially as follows:

(a) That on the date of the filing of the Bankruptcy Petition in the above-entitled cause, Harold Edwin Kerry was a partner in the partnership known as The West Tenino Lumber Company, and had theretofore, for good and valuable consideration, assigned his interest in the said partnership to petitioner, Ruth B. Kerry, and that any interest which the said Harold Edwin Kerry had in the said partnership was as of the date of the filing of the said Bankruptcy Petition, subject to the said assignment.

(b) That the aforesaid assignment of partnership interest from H. E. Kerry to Ruth B. Kerry, petitioner, is a valid and effective assignment and is a transfer so far perfected as to be valid and effective as against the Trustee in Bankruptcy herein, and that the rights of Ruth B. Kerry under and by

virtue of the said assignment of partnership interest are superior to the rights of the Trustee herein.

(c) That the value of the said 45/88ths interest in the aforesaid partnership was, as of the date of the filing of the Bankruptcy Petition in the above-entitled cause, and now is substantially less than the principal sum of \$29,250.00 owing to Ruth B. Kerry, and consequently, the estate has no interest in the said partnership which is of any value, and that to attempt to administer the said interest in the partnership would be burdensome to the estate.

(d) That the petition of Ruth B. Kerry should be granted and that the Trustee should be directed to abandon any claimed interest in the aforesaid partnership and that the petitioner, Ruth B. Kerry, be authorized and permitted to acquire by assignment and bill of sale from a bankrupt, by foreclosure of the said assignment, or otherwise, in any court of competent jurisdiction other than this court of bankruptcy, all interest in the said 45/88ths interest in the aforesaid partnership.

4. The Referee erred in failing to enter an order granting the Petition of Ruth B. Kerry, authorizing and directing the Trustee in Bankruptcy herein to abandon any claim with respect to the aforesaid partnership, for the reason that the same would be burdensome to the estate; and authorizing Ruth B. Kerry to acquire, by further assignment and bill of sale from the bankrupt, foreclosure or otherwise, in any court of competent jurisdiction other than this Court of Bankruptcy, all interest in and to the

said 45/88ths interest in the aforesaid partnership.

Wherefore, Petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to bankruptcy, that the said order be reversed, that Petitioner be granted the relief prayed for in her Petition of January 21, 1954, and referred to hereinabove, that an order be entered granting said relief, and that your Petitioner have such other and further relief as is just.

Dated: This 14th day of June, 1954.

/s/ RUTH B. KERRY,
Petitioner.

BOGLE, BOGLE & GATES,

/s/ ARTHUR G. GRUNKE,
Attorneys for Petitioner,
Ruth B. Kerry.

[Endorsed]: Filed June 15, 1954.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable George H. Boldt, United States
District Judge:

I, O. M. Pitzen, Referee in Bankruptcy in charge of this proceeding, do hereby certify that in the course of such proceedings an Order was entered herein denying the Petition of Ruth B. Kerry to abandon to her a 45/88ths interest in a partnership known as "The West Tenino Lumber Company" as a burdensome asset, or determining that the pledge

of said partnership interest is valid as to the Trustee; that thereafter, in due time, Ruth B. Kerry, feeling aggrieved by this Order, filed a Petition for Review thereof.

Summary of Facts

Ruth B. Kerry employed a court reporter to make a record of the proceedings and, after the Court had rendered its Memorandum Decision, a transcript of said proceedings was filed by Ruth B. Kerry and is attached hereto; and that thereafter the Court made and entered its Findings of Fact and Conclusions of Law and a summary of the facts are in the Referee's Memorandum Decision.

Question Presented

Is a pledge of an interest in a partnership as collateral for money loaned, without any filing or recording thereof, valid as to a trustee in bankruptcy.

Conclusion

My conclusion, as set forth in the Memorandum Opinion attached hereto is that an interest in a partnership is not capable of being pledged without notice thereof being filed with the Secretary of State, as the same would constitute a secret lien.

Papers Transmitted

I transmit herewith the following papers:

Petition to Have Trustee Abandon Burdensome Asset and Permit Petitioner to Foreclose Pledge.

Petition of Trustee to Have Referee Determine Title to Property and Require Persons in Possession to Turn Property Over to Trustee.

Reply of Ruth B. Kerry to Petition of Trustee to Have Referee Determine Title to Property.

Notice of Hearing Trustee's Petition to Void All Pledges, Assignments, Notes or Contracts, to Determine Title & Turn-Over.

Petitioner's Exhibit 1—Promissory Note.

Petitioner's Exhibit 2—Promissory Note.

Petitioner's Exhibit 3—Pledge Agreement.

Petitioner's Exhibit 4—Agreement.

Petitioner's Exhibit 5—Resolution for Voluntary Dissolution of West Tenino Lumber Company.

Petitioner's Exhibit 6—Partnership Agreement.

Petitioner's Exhibit 7—Bill of Sale.

Petitioner's Exhibit 8—Certificate of Firm Name.

Petitioner's Exhibit 9—Assignment.

Petitioner's Exhibit 10—Canceled check.

Memorandum of Authorities of Ruth B. Kerry.

Memorandum of Authorities of Trustee.

Reply Memorandum of Ruth B. Kerry.

Referee's Memorandum Decision.

Motion on Behalf of Ruth B. Kerry for Rehearing.

Findings of Fact and Conclusions of Law.

Order.

Petition for Review.

Court Reporter's Transcript of Testimony.

Dated at Tacoma, in said District, this 15th day of June, 1954.

/s/ O. M. PITZEN,

Referee in Bankruptcy.

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

MEMORANDUM DECISION

The "assignment" dated December 30, 1952, in fact is not an assignment but by its term purports to be a pledge of the bankrupt's partnership interest in West Tenino Lumber Company to secure indebtedness referred to in the document. Such character of the document was recognized by the parties in the hearing before the Referee (TR. 34) and acknowledged by petitioner's counsel at the argument in this Court. Unless the execution and delivery of such document created a valid and completed pledge petitioner is merely a general creditor of the bankrupt and she has no basis for claiming the partnership interest as security for her claim.

Washington law is controlling and under the Washington decisions there is no question but that to complete a pledge delivery of the pledged property is essential.

"In passing upon the question of necessity of delivery of personal property to complete a pledge, this court stated in *Kuhn v. Groll*, 118 Wash. 285, 203 Pac. 44:

" 'It is true that the law requires a delivery of the pledged property from the pledgor to the pledgee and a retention of it by the pledgee in order to make the pledge fully effectual as security. We think the law applicable to the situ-

ation we find here is well stated in 21 R.C.L. 643, as follows:

“ “ “The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception, for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods. If, however, the pledgee has the thing already in his possession, the very contract transfers to him, by operation of law, a virtual possession thereof as a pledge the moment the contract is completed.” ’

“Of like import, see *Hastings v. Lincoln Trust Co.*, 115 Wash. 492, 197 Pac. 627, 18 A.L.R. 583; *Bank of California v. Danamiller*, 125 Wash. 255, 215 Pac. 321, 36 A.L.R. 753; *Qualley v. Snoqualmie Valley Bank*, 136 Wash. 42, 238 Pac. 915; *Hodge v. Truax*, 184 Wash. 360, 51 P. (2d) 357, 103 A.L.R. 420.”

In the last cited decision the same rule was applied in a case involving a chose in action wherein it was said:

“One of the prime requisites of a pledge is that the pledgor has parted with his property and that the pledgee has possession or control over it.” *Hodge v. Truax*, *supra*.

From the record and the unchallenged facts found by the Referee it is clear that the partnership interest of the bankrupt was not relinquished by the bankrupt or delivered to Mrs. Kerry. Accordingly,

no valid pledge was completed under Washington law.

The foregoing view of the matter makes it unnecessary to consider whether an incompleted pledge of a partnership interest is within the Washington definitions of either chattel mortgage or accounts receivable.

Petition for review denied and the order of the Referee dated June 11, 1954, sustained.

Dated at Tacoma, Washington, this 28th day of July, 1954.

/s/ GEORGE H. BOLDT,
United States District Judge.

[Endorsed]: Filed July 30, 1954.

United States District Court, Western District of
Washington, Southern Division

In Bankruptcy—No. 15920

In the Matter of:

HAROLD EDWIN KERRY, and the Community
of HAROLD EDWIN KERRY and RUTH B.
KERRY, His Wife,

Bankrupt.

ORDER

At Tacoma, in said District, on the 12th day of
August, 1954.

Ruth B. Kerry, having filed a petition for review
of findings of fact, conclusions of law and order of

O. M. Pitzen, Referee in Bankruptcy, entered June 11th, 1954, and the said Referee having certified and transmitted to this Court the record of proceedings of the said Referee, and both the petitioner and the Trustee in Bankruptcy having filed a memorandum of points and authorities with reference to said petition for review, and a hearing having been held before the undersigned Judge of the above-entitled court, at which time the record certified and transmitted in bankruptcy was considered and argument having been made for and in behalf of the petitioner by Arthur G. Grunke, of Bogle, Bogle & Gates, attorneys for petitioner, Ruth B. Kerry, and argument having been made for and in behalf of the Trustee by Stanley J. Krause, his attorney, and the Court having made and filed his Memorandum Decision wherein petition for review was denied, and Order of the Referee dated June 11th, 1954, was sustained, and the attorneys for the petitioner having made a motion for rehearing of her petition for review, and the Court being fully advised, now, therefore,

It Is Hereby Ordered, that Ruth B. Kerry's motion for a rehearing is denied.

It Is Further Ordered that the petition of Ruth B. Kerry for a review of the Findings of Fact, Conclusions of Law and Order of the Referee in Bankruptcy, dated June 11th, 1954, is denied, and the said findings of fact, conclusions of law and order of the Referee herein dated June 11th, 1954, is hereby approved, affirmed and sustained.

Dated at Tacoma, Washington, this 12th day of August, 1954.

/s/ GEORGE H. BOLDT,
United States District Judge.

[Endorsed]: Filed and entered August 12, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Ruth B. Kerry, the Petitioner named in that certain Petition for Review in the above-entitled Bankruptcy Cause, and in the proceeding and controversy commenced therein by her Petition to have Trustee abandon burdensome asset and permit Petitioner to foreclose pledge, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Order of the said United States District Court, entered in favor of Joseph R. Schneider, Trustee in Bankruptcy (Appellee) on August 12, 1954, in the said proceeding and controversy, which Order involves more than Five Hundred Dollars; and the said Petitioner does further appeal to the said United States Court of Appeals from the Order made by the Honorable O. M. Pitzen, Referee in Bankruptcy for the said District and Division, and entered in favor of said Appellee in the said Cause on June 11, 1954, from which said Order the afore-said Petition for Review was filed, and with respect

to which said Order the aforesaid Final Order of the said United States District Court was entered on August 12, 1954.

BOGLE, BOGLE & GATES,
/s/ ARTHUR G. GRUNKE,
Attorneys for Petitioner,
Ruth B. Kerry.

Affidavit of Mail attached.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Ruth B. Kerry, as principal, and American Bonding Company of Baltimore as surety, are held and firmly bound unto Joseph R. Schneider, Trustee in Bankruptcy for the above-entitled bankrupt estate, his successors and assigns, to which payment well and truly to be made we bind ourselves and our heirs, executors, administrators, successors and assigns, jointly and severally, by these presents.

Done this 8th day of September, in the year of our Lord, one thousand nine hundred and fifty-four.

Whereas, in the above-entitled Court and Cause a Final Order was entered against the said Ruth B. Kerry, and in favor of the said Joseph R. Schneider, Trustee in Bankruptcy, as aforesaid, and

the said Ruth B. Kerry filing in said Court a Notice of Appeal to reverse the aforesaid Final Order by an appeal to the United States Court of Appeals for the Ninth Circuit,

Now, Therefore, the condition of the above obligation is such that, if the said Ruth B. Kerry will pay all costs should the said appeal be dismissed or the said Final Order be affirmed, or such costs as the Appellate Court may award should the said Order be modified, then the above obligation is to be void, but otherwise to be and remain in full force and effect.

/s/ RUTH B. KERRY.

AMERICAN BONDING
COMPANY OF BALTIMORE,
Surety;

By /s/ R. N. WELLER,
Attorney-in-Fact.

[Endorsed]: Filed September 9, 1954.

[Title of District Court and Cause.]

MOTION FOR TRANSMITTAL OF EXHIBITS

The Petitioner, Ruth B. Kerry, respectfully moves that an Order be entered under Rule 75(i) for the transmittal of the original exhibits introduced in the proceedings in the above-entitled matter before the Referee in Bankruptcy on March 18, 1954, and transmitted to and filed with the above-

named District Court with said Referee's Certificate on Review, filed in the above Cause with the said District Court on June 15, 1954, to the Clerk of the United States Court of Appeals for the Ninth Circuit.

This motion is based upon the records and files in this case and the Affidavit of Arthur G. Grunke, hereto attached.

Dated: September 9, 1954.

BOGLE, BOGLE & GATES,

/s/ ARTHUR G. GRUNKE,

Attorneys for Petitioner,

Ruth B. Kerry.

Affidavit

State of Washington,
County of King—ss.

Arthur G. Grunke, being first duly sworn, on oath deposes and says:

That this affiant is one of the attorneys of record for Ruth B. Kerry, the Petitioner, who has given Notice of Appeal to the Court of Appeals for the Ninth Circuit in the matter referred to in the foregoing Motion for Transmission. That the exhibits introduced in evidence in this matter, and specified in Appellant's Designation of Record on Appeal, are the basis of Appellant's Petitions filed in the said proceeding, and could be determinative of the

rights of the parties to the proceeding, and it is highly advisable that the said original exhibits be before the Court of Appeals in order that it may have them available for such use or review as it may deem appropriate.

/s/ ARTHUR G. GRUNKE,

Subscribed and sworn to before me this 9th day of September, 1954.

[Seal] /s/ M. B. CRUTCHER,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 17, 1954.

[Title of District Court and Cause.]

ORDER DIRECTING TRANSMITTAL
OF EXHIBITS

The Motion of Ruth B. Kerry, Petitioner and Appellant in certain proceedings in the above-entitled Bankruptcy Cause, for the transmittal of original exhibits in said proceedings, to the Clerk of the United States Court of Appeals for the Ninth Circuit, under Rule 75(i), Rules of Civil Procedure, having been presented to this Court, and it appearing that the said Motion was duly served on Joseph

R. Schneider, Trustee in Bankruptcy of the above-named bankrupt and Stanley J. Krause, his attorney of record herein, and the Court being fully advised in the premises,

It Is Ordered, that the original exhibits in the above-entitled matter, with respect to that proceeding therein which was tried before the Honorable O. M. Pitzen, Referee in Bankruptcy, on March 18, 1954, and which exhibits were duly transmitted to and filed with this Court, with said Referee's Certificate on Review, in the said proceeding in the above-captioned matter, on June 15, 1954, be transmitted to the United States Court of Appeals for the Ninth Circuit as part of the record on appeal, to be returned to this Court when and as directed by the said Court of Appeals.

Done in open Court this 20th day of September, 1954.

/s/ GEORGE H. BOLDT,
District Judge.

Presented by:

ARTHUR G. GRUNKE, of
BOGLE, BOGLE & GATES,
Attorneys for Ruth B. Kerry
(Petitioner and Appellant).

Approved for Entry:

/s/ STANLEY J. KRAUSE,
Attorney for Trustee in
Bankruptcy.

[Endorsed]: Filed September 20, 1954.

In the District Court of the United States for the
Western District of Washington, Southern Division

In Bankruptcy No. 15920

In the Matter of:

HAROLD EDWIN KERRY, and the Community
of HAROLD EDWIN KERRY, and RUTH B.
KERRY, His Wife,

Bankrupt.

TRANSCRIPT OF PROCEEDINGS

Before O. M. Pitzen, Esq., Referee in Bankruptcy,
in the Federal Building at Tacoma, Washington, on
March 18, 1954.

Appearances:

The petitioner, Ruth B. Kerry, appearing
and being represented by Arthur G. Grunke,
Esq., of the law firm of Bogle, Bogle & Gates;
and

The trustee appearing and being represented
by Stanley J. Krause, Esq.

Thereupon, the following proceedings were had
and done and testimony given, to wit:

The Referee: Mr. Krause, we have two or three
matters, I guess, which one did you wish to take up
first? Do you have it?

Mr. Krause: I think that your petition is
the——

Mr. Grunke: I believe that they're all inter-related.

Mr. Krause: All primarily the same thing.

Mr. Grunke: It might help if I could tell you just somewhat how they do inter-relate, and whether they were inter——

The Referee: Well if you would, yes.

Mr. Grunke: I'd have to review the files.

The Referee: It'd probably be a good idea if you would; or we'd never know where we got them.

Mr. Grunke: All right.

The Answer primarily of the petition of Ruth B. Kerry who's the wife of the man—as your Honor, will recall, we had Mr. Kerry and the community adjudicated as a bankrupt. Mrs. Kerry in her own individual name as such did not ever petition nor was she ever adjudicated. She has had such properties and on occasion will be adjudicated individually.

The petition that we have in court was a [2*] petition by Mrs. Kerry, to have certain property which was assigned to her. The basis for our petition is this; to call for the petition to direct the trustee to abandonment of certain properties burdensome so that we won't have to go into any foreclosure proceedings enjoining trustee and so on, just adding expenses to the bankrupt estate for no purpose. And our petition states two grounds that are in conjunction; namely, number one the property, a partnership interest in a partnership in which Mr. Kerry was a partner, that the partnership interest was assigned to Mrs. Kerry as security

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

for a loan. And number two, the values of the partnership interest is substantially less than the balance owing on the loan, which the assignment of the partnership interest secures.

So, consequently it's our petition that this partnership interest that the trustee be authorized and directed by this Court to give up all claims to the partnership interest. The trustee obviously has not done so and obviously would not do so without a court order and just what defenses to our petition or what he might contend to the contrary, I just do not know, but at any rate we desire a court order to clear the bankrupt estate from that [3] partnership interest on the theory that, and on the ground that the value will be substantially less than the amount which has been secured so there's no need actually for the bankruptcy estate and then Mrs. Kerry can either foreclose or whatever she needs to do to clear up Mr. Kerry's interest and realize what she can on this bankrupt—on this partnership interest.

Mr. Kerry was a partner in a corporation known as West Tenino Lumber Company. Prior to that the business had been—the business was incorporated originally. Then it was—in December of '52, it was dissolved, the corporation was dissolved, and a partnership was established on the same day and Mr. Kerry became a partner along with the other shareholders in the same proportions at which they held stock.

Mrs. Kerry—the stock in the corporation had been pledged to Mrs. Kerry, while the corporation was

still in existence some 6 months or so prior to its dissolution. She had made a loan of cash to Mr. Kerry, the details will come out in the evidence, but as the evidence will show, she made a cash loan to pick up the bank loan that Mr. Kerry owed her, which was called, and the stock was pledged to her. It previously had been pledged to the bank, and she was [4] given a note for the amount of the money she actually acquired and put up.

When the corporation was dissolved all the documents, the files will show, were simultaneous. The corporation was dissolved on December 30th, which was the same day that Mrs. Kerry and Mr. Kerry executed an agreement, which permitted Mr. Kerry to vote the stock for dissolution and by the terms of the same agreement created a pledge in Mrs. Kerry of the partnership, of the interest Mr. Kerry was a partner. It was a partnership interest. And on that same day also Mr. Kerry executed a separate document called an assignment to effect such a partnership interest. Also——

The Referee: Pardon me, but maybe we're getting off the record. I just want to know which one of you is going to speak up first, so we get the record straight. Then, if you will, we'll get this thing going.

Mr. Grunke: But, then there are in this——

The Referee: Well, will you reserve your statement until we get the——

Mr. Grunke: Oh——

The Referee: ——I just asked you which one of these procedures you wanted to get going, if [5] that would make any difference——

Mr. Grunke: Excuse me. Excuse me, I'm sorry.

The Referee: So for the record here. At this time I take up the petition to have trustee abandon burdensome assets and permit petitioner to foreclose his place. And the records show that Mr. Harold Edwin Kerry is present in person and also Ruth B. Kerry is present in person and being represented by their attorney——

Mr. Grunke: That's correct. Grunke. G-r-u-n-k-e.

The Referee: Mr. Grunke.

The trustee——

Mr. Krause: Joseph Schneider. Mr. Schneider.

The Referee: What is his full name?

Mr. Schneider: J. R. Schneider.

The Referee: J. R. Schneider, being present in person and being represented by his attorney, Stanley Krause.

Is there anyone else?

Are you appearing?

Mr. Preszler: Just as a witness, your Honor. [6]

Mr. Grunke: But that in substance is the gist of our plea that the interest was assigned and I will substantiate that then after the bankruptcy and the debt is secured. And it is in order for the trustee as quickly as can be done to abandon the encumbered property.

And our witnesses will be Mr. Kerry and Mrs. Kerry, who will testify to the common facts outlined in the brief, and that we have certain documentary evidence also and so, shall we proceed with the testimony then?

The Referee: Yes, please.

Mr. Grunke: Mr. Kerry, would you take the stand, please. [7]

HAROLD EDWIN KERRY

called as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grunke:

Q. Will you state your name, please?

A. Harold Edwin Kerry.

Q. That's spelled, K-e double r-y? A. Yes.

Q. And you are the husband of Ruth B. Kerry, may I ask? A. Yes.

Q. And you are also the bankrupt named in this proceeding? A. Yes.

Q. Now, Mr. Kerry, you had some connection with a business known as West Tenino Lumber Company, did you not? A. Yes.

Q. Would you tell us, as of during the year 1952, what your interest in that company was and what was the nature of it?

A. In 1952 the West Tenino Lumber Company, was a corporation in which I owned something over 51 per cent, a fraction over 51 per cent of the stock.

Q. That was 51 point 13, I believe.

A. 51 point 13 or 14; between those two [8] figures.

Q. And you were a shareholder in the corporation, to that extent? A. Yes.

Q. And who were of the other shareholders?

(Testimony of Harold Edwin Kerry.)

A. Other shareholders in 1952 were C. L. Stickney, Israel Torrico, Mr. Charles Preszler. That's all.

Q. And did you have any office or other position with the corporation other than shareholder?

A. Yes, I was president of the company.

Q. And you were a director?

A. And a director.

Q. Now, calling your attention to the summer of 1952—July of 1952, were there any transactions with respect to your shares of stock in the corporation?

A. Yes. In July—I think it was July of 1952, the bank who held my stock as security for the purchase of the interests of a former partner of mine, who had died a couple of years before that called the loan, which balance of the loan at that time amounted to \$29,250.

Q. That was a loan secured by what?

A. A loan secured by the West Tenino stock, and stock in the Olympic Stud Mill.

Q. The Olympic Stud Mill is a separate corporation? A. A separate corporation, yes.

Q. And so that your shares of stock in the [9] two corporations were pledged to which bank?

A. They were pledged to the Trust Department of the First National Bank, in Seattle.

Q. Seattle First National? A. Yes.

Q. And do you know approximately when that pledge to the bank was made?

(Testimony of Harold Edwin Kerry.)

A. The pledge to the bank was made in either '51 or '52, shortly after the death of my partner.

Q. You say it was either '50 or '51?

A. '50, or '51, yes, sir. That is correct.

Q. Now in 1952, what action did the bank take with respect to that loan and the purported pledge?

A. In July of '52, the bank called me and said that they were going to call the loan and sell out the stock at that time.

Q. What was done then, in view of that——

A. Then Mrs. Kerry decided that she would sell some of her securities and step into the shoes of the bank and take over the pledges that the bank had.

Q. And was that accomplished?

A. That was accomplished in July of '52.

Q. And how much money did Mrs. Kerry put up?

A. She put up \$29,250.

Q. And to whom was that money paid by Mrs. Kerry? [10]

A. That was a cashier's check, payable to the First National Bank of Seattle.

Q. Did you furnish that \$29,250 to Mrs. Kerry?

A. No, that came entirely from Mrs. Kerry's own funds.

Q. Did you furnish any part of it?

A. No part of it at all.

Q. Showing you what has been marked for identification, Mr. Kerry, as Petitioner's identification number 1, which is an instrument dated August of 1950, just tell us what that instrument is?

(Testimony of Harold Edwin Kerry.)

A. This is a promissory note dated August 15th, 1950, for \$75,000——

Q. Payable to whom?

A. Payable to the First National Bank of Seattle, as executor of the last will of John X. Johnson, of Johnson deceased.

Q. And that is the loan that you speak of that you owed to the bank. It is with respect to the West Tenino, and the loan that's written up here for a pledge? A. Yes.

Q. To the bank? A. That's correct.

Q. And that is the loan which—were payments made on that loan?

A. Yes. Payments were made on that loan. [11]

Q. And it was paid down then to what balance?

A. And the balance was settled as of \$29,250.

Q. I see.

So the loan of \$75,000, had been paid down considerably between August, 1950, and July of '52?

A. Yes.

Q. And then in July of '52, there was that balance of——

A. That was the total amount, yes.

The Referee: We'll just take a short recess.

(Recess.)

Q. Now Mr. Kerry, showing you what has been marked for identification as Petitioner's identification number 2, a document dated July 28th, 1952, can you tell us what that document is?

A. Yes. This is a note for \$29,250, dated July

(Testimony of Harold Edwin Kerry.)

28th, 1952, made payable to the order of Ruth B. Kerry and signed by me.

Q. And in what connection was that note made?

A. That note was made for the \$29,250 Mrs. Kerry paid to the First National Bank, in settlement of my note to the First National Bank.

Q. In other words the transaction you've just been testifying about? [12] A. Yes.

Q. And that note was signed by whom?

A. That's signed by me.

Q. That's Exhibit 2.

Now, identification number 1, is signed by whom?

A. That's signed by me, also.

Q. And I notice there's also a signature "H. E. Kerry Company," by you.

A. Also signed by—signed by H. E. Kerry Company by me, sole owner of H. E. Kerry Company.

Q. In other words H. E. Kerry Company was not a corporation or a partnership, is that right?

A. No, sole ownership.

Q. Yes. Now, Mr. Kerry, showing you what's been marked as Petitioner's identification number 3, can you tell us what that document is?

A. This is a pledge agreement entered into on the 28th of July, 1952, between me and Mrs. Kerry, the pledgee—

Q. And by whom was that—

A. —and executed by me and also by Mrs. Kerry.

Q. And what—by the terms of that document, what was the pledge? What assets were pledged?

(Testimony of Harold Edwin Kerry.)

A. The assets this—the stock in the West Tenino Lumber [13] Company was pledged to Mrs. Kerry.

Q. Was there anything else?

A. I don't—yes, and the—250 shares of the common stock in the Olympic Stud Mill as well, the corporation.

Q. What percentage of the Olympic Stud Mill stock did that represent?

A. That represented 50 per cent of the stock.

Q. And the stock in the West Tenino Lumber Company, was that all of your stock or a portion of it?

A. This was all of my stock in the West Tenino Lumber Company.

Q. In other words the 51 point 13 per cent interest that you had in the company? A. Yes.

Q. When was the pledge you gave, identification number 3, executed with respect to the time of the note? A. With respect to what?

Q. With respect to the note, identification number 2? A. At the same time.

Q. And were they executed before or after Mrs. Kerry put up the \$29,250?

A. They were executed at the time that Mrs. Kerry put up the \$29,250.

Q. I see.

In other words that was all done on the [14] same day, is that right?

A. Simultaneously.

Mr. Grunke: We'll offer identifications 1, 2, and 3, in evidence.

(Testimony of Harold Edwin Kerry.)

Mr. Krause: No objection.

The Referee: If there are no objections then identifications 1, 2 and 3 will be admitted in evidence as Exhibits 1, 2 and 3, Petitioner's Exhibits 1, 2 and 3.

(Whereupon, the documents referred to were marked and admitted into evidence as Petitioner's Exhibits Nos. 1, 2 and 3, respectively.)

PETITIONER'S EXHIBIT No. 1

Promissory Note

\$75,000.00

Seattle, Washington, August 15, 1950.

As herein provided, after date, without grace, I promise to pay to the order of Seattle-First National Bank, as Executor of the Last Will of John X. Johnson, Deceased, at Seattle, Washington, the sum of Seventy-five Thousand Dollars lawful money of the United States at the rate of Five Thousand Dollars (\$5,000.00), or more, quarterly, commencing on the 15th day of November, 1950, and each quarter thereafter until fully paid. The unpaid balance shall bear interest at the rate of five per cent (5%) per annum after declaration of default hereof, and said quarterly payments shall bear interest at the rate of five per cent (5%) per annum from maturity. All payments shall be applied first

(Testimony of Harold Edwin Kerry.)

on account of accrued interest and then on account of principal.

In the event of default in the payment of any of said payments herein provided for, the whole sum due hereunder shall become immediately due and collectible, at the option of the holder of this note, and in case suit or action is instituted to collect this note, or any portion thereof, I promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum as the court may deem reasonable as attorney's fees to be allowed in such suit or action, and the venue of any such suit may, at the option of the holder hereof, be laid in King County, Washington.

/s/ H. E. KERRY,

H. E. KERRY COMPANY,

By /s/ H. E. KERRY,

Sole Owner.

Received on Within Indebtedness

4-26-51	\$1,000.00
5-16-51	6,500.00
Sept. 28, 1951	2,500.00
May 5, 1952	5,000.00

[In longhand on face of original]: Satisfied—
7-29-52.

SEATTLE 1ST NATIONAL
BANK, EXEC.,

[Signature of Officer.]

[Endorsed]: Filed March 25, 1954.

(Testimony of Harold Edwin Kerry.)

PETITIONER'S EXHIBIT No. 2

\$29,250.00

Seattle, Washington

July 28, 1952.

For Value Received, Harold E. Kerry promises to pay to the order of Ruth B. Kerry the sum of Twenty-Nine Thousand Two Hundred Fifty Dollars (\$29,250.00), lawful money of the United States of America, with interest thereon in like money at the rate of five per cent (5%) per annum from the date hereof. This note is secured by a pledge from the undersigned to said Ruth B. Kerry, dated July 28, 1952. The terms and conditions of said pledge are incorporated herein and by this reference made a part hereof.

Interest shall be payable annually. The principal and all accrued interest shall be paid on or before July 28, 1957.

If default be made in the making of any payment provided for herein when due or in the keeping or performing of any term, condition, covenant or agreement to be kept and performed by the undersigned in accordance with said pledge agreement, then at the option of the holder of this note, without prior notice, the entire indebtedness evidenced hereby shall immediately become due and thereafter bear interest at the rate of ten per cent (10%) per annum.

(Testimony of Harold Edwin Kerry.)

If this note is placed in the hands of an attorney for collection after any default, whether suit be brought or not, the undersigned promises and agrees to pay all costs of collection including a reasonable attorney's fee and that at the option of the holder the venue of any such suit may be laid in King County, State of Washington.

Every person or party at any time liable for the payment of the debt hereby evidenced, waives presentment for payment, demand, protest and notice of non-payment of this note, and consents that the holder may extend the time of payment or otherwise modify the terms of payment of any part or the whole of the debt at any time at the request of any other person liable, and that further security of every type may be accepted, all without affecting the liability of such person or party in any way.

/s/ HAROLD E. KERRY.

[Endorsed]: Filed March 25, 1954.

(Testimony of Harold Edwin Kerry.)

PETITIONER'S EXHIBIT No. 3

Pledge Agreement

This Agreement made and entered into this 28th day of July, 1952, by and between Harold E. Kerry, hereinafter called "Pledgor" and Ruth B. Kerry, hereinafter called "Pledgee,"

Witnesseth

Whereas, Pledgee has advanced out of her own separate funds to Pledgor the sum of Twenty-Nine Thousand Two Hundred Fifty Dollars (\$29,250.00), in consideration of the execution and delivery of a certain promissory note of the Pledgor in favor of the Pledgee; and

Whereas, Pledgee demands collateral security to secure the payment of said note and Pledgor is willing to give such security;

Now, Therefore, in consideration of the foregoing recitations and of the mutual covenants hereinafter expressed it is Mutually Agreed as follows:

Article I. Note to Be Secured:

The promissory note to be secured is as follows:

One (1) promissory note, executed by Harold E. Kerry, dated July 28, 1952, payable to Ruth B. Kerry in the sum of Twenty-Nine Thousand Two Hundred Fifty Dollars (\$29,250.00), bear-

(Testimony of Harold Edwin Kerry.)

ing interest at the rate of five per cent (5%) per annum, said note maturing July 28, 1957.

Article II. Security:

To secure payment of said note Pledgor herewith deposits with and delivers to Pledgee the following property:

Certificate No. 7 for 90 shares of the common stock of West Tenino Lumber Company;

Certificate No. 10 for 135 shares of the common stock of West Tenino Lumber Company;

Certificate No. 2 for 250 shares of the common stock of Olympic Stud Mill, Inc.

Article III. Conditions:

(a) Pledgor agrees that upon breach of any of the conditions contained in the note described in Article II herein, or upon failure to pay said note when due, Pledgee may thereupon or at any time or times thereafter sell all or part of the security described in Article II herein, and any substitute therefor, and any additions thereto, at any broker's board or at public or private sale, without notice, advertisement or demand of any kind, and may apply the net proceeds, after deducting all costs and expenses for collection, sale and delivery, to the payment of said note, returning the residue to the Pledgor on demand.

Pledgee may purchase any of said property at any such broker's board or public or private sale.

(Testimony of Harold Edwin Kerry.)

(b) In the event of decline in the market value of said property pledged as security or any part thereof, the Pledgee may demand the pledge and delivery of additional property of quantity and amount satisfactory to Pledgee; and the failure on the part of the Pledgor to deliver such additional property on demand shall cause said note to become due and payable on demand.

(c) Upon full and complete payment of said note described in Article I herein, Pledgee shall immediately deliver up to Pledgor all collateral then remaining with Pledgee.

In Witness Whereof the parties hereto have caused this agreement to be executed the day and year first above written.

/s/ HAROLD E. KERRY,
Pledgor.

/s/ RUTH B. KERRY,
Pledgee.

Witness:

/s/ GEORGE R. DION.

Witness:

/s/ GEORGE R. DION.

(Testimony of Harold Edwin Kerry.)

Q. Now Mr. Kerry, calling your attention again to the business known as West Tenino Lumber Company. You stated that during 1952 it was a corporation. Is it still a corporation or did it cease at some time to be a corporation?

A. No, the corporation was dissolved on December 30th, 1952, and then it became a partnership with each one retaining the percentage of interest that the—their stock represented in the corporation.

Q. And in view of the fact that your shares of stock were pledged to Mrs. Kerry, how was the dissolution of the corporation accomplished?

A. Well, the corporation was dissolved with the permission [15] of Mrs. Kerry to—for me to vote for the dissolution under the pledge agreement.

Q. Was that permission and that arrangement oral or in writing?

A. That was in writing.

Q. Now Mr. Kerry, showing you what has been marked for identification as Petitioner's identification number 4, can you tell us without reading it, can you tell us what that document is?

A. This is an agreement between Mrs. Kerry and myself, Mrs. Kerry as assignee and myself as assignor——

Q. What does it accomplish, I mean, in a general way?

A. It assigned the—this authorized me to vote the stock of the corporation for dissolution.

Q. And did it do anything else?

(Testimony of Harold Edwin Kerry.)

The Referee: Pardon me. 4, that was authorization to vote the stock?

The Witness: Yes. This is the agreement in which I was authorized to vote the stock of the West Tenino Lumber Company, to transfer the assets to the partnership.

Q. And what else, if anything, did the agreement authorize?

A. Well then at the same time to execute an assignment to assignee of all rights, titles and interest in the [16] partnership.

Q. And that agreement is signed by whom?

A. That's assigned—that's signed by me as assignor and Mrs. Kerry as assignee.

Mr. Grunke: Perhaps, if the Court please, the two critical parts of the document should be read so that the—because I think this is one of the critical documents in this whole case, so the Court will have the advantage of it.

“After certain recitations the former pledges we made in July were as follows:” It goes on to state: “Now therefore it is mutually agreed as follows:

“Assignee”—and Mrs. Kerry is referred to as the assignee—“does hereby authorize and allow Mr. Kerry to vote this stock for the dissolution of West Tenino Lumber Company, a Washington corporation, provided that said dissolution and transfer of assets to the partnership is to be performed simultaneously therewith and the partnership is to be known as West Tenino Lumber Company.”

Paragraph II: “Simultaneously with the release

(Testimony of Harold Edwin Kerry.)

of said pledge assignor shall execute an assignment to assignee of all of his rights, titles and interests in said partnership as additional [17] security for the payment of said promissory note dated July 28th, 1952, in the sum of \$29,250.00, in witness whereof and so forth."

Q. Now, Mr. Kerry, was—can you tell us whether the corporation in fact dissolved or not?

A. Yes, it was.

Q. And I show you what has been marked for identification as Plaintiff's 5, which is a certified copy from the Secretary of State of a certificate of dissolution of a corporation.

Would you read that and tell us whether—if you recognize whether or not it relates to West Tenino Lumber Company, the corporation you have referred to?

A. You want me to read the document?

Q. Yes, just read it to yourself and tell us whether it relates to this dissolution we have been referring to.

A. It certifies—it resolved that the West Tenino Lumber Company be wound up and dissolved out of court, and this dissolution did take place.

Q. So this is the resolution that was adopted and filed with the Secretary of State for the dissolution of your company?

A. That's correct.

Q. Of the company in which you were a shareholder.

And showing you what has been marked as [18]

(Testimony of Harold Edwin Kerry.)

Petitioner's identification 6, without reading it to us, just what is that document?

A. This is the partnership agreement between the partners of the West Tenino Lumber Company.

Q. And who are they?

A. The partners are: H. A. Preszler, Israel Torrico, C. L. Stickney and myself.

Q. And by whom is the document signed?

A. It was signed by all four of those partners.

Q. That you've just named? A. Yes.

Q. And does it specify your partnership interest? That is your percentage or fractional interest in the partnership? A. Yes, it does.

Q. And what does it specify?

A. It shows my interest at forty-five eighty-eight.

Q. And that works out percentagewise at 51 point 13—— A. 51 point 13.

Q. ——that figure you were talking about?

A. Yes.

Q. And did the partnership then do business as a partnership after that? A. Yes.

Q. Showing you what has been marked as [19] Petitioner's identification 7, which is a document certified by the County Auditor of Thurston County, can you tell us what that document is?

A. This is a bill-of-sale and transfer of assets and the liquidation of the corporation to the partnership.

Q. And it's signed by whom?

A. This is signed by me as liquidating trustee.

(Testimony of Harold Edwin Kerry.)

Q. You were the liquidating trustee of the corporation? A. Yes.

Q. And that transfers how much of the assets of the corporation to the partnership?

A. That transfers all of the assets of the corporation to the partnership.

Q. And showing you what's been marked as Petitioner's identification number 8, which is also a certified document from the Thurston County Clerk. Can you tell us in a general way what that is?

A. This is certificate of a firm name of the West Tenino Lumber Company.

Q. And it's executed by whom?

A. This is also signed by me and by Mr. Stickney, and by Mr. Torrico and Mr. Preszler. The four partners.

Q. Now showing you, Mr. Kerry, what has been marked as Petitioner's identification number 9, can you tell me what that is? [20]

A. Yes. This is the assignment wherein I assigned to Ruth B. Kerry, all of my rights, titles and interest in the partnership of the West Tenino Lumber Company.

Q. And whose signature is on that document?

A. That's my signature, and it's dated December the 30th, 1952.

Q. And as a matter of fact all of these documents you have been referring to, all have the date December 30th, 1952, do they not?

A. Yes, that's correct.

Q. And the Secretary of State's certificate with

(Testimony of Harold Edwin Kerry.)

respect to the dissolution certificate indicates that it was filed on December 30th, 1952?

Mr. Grunke: I'll offer identifications—Petitioner's identifications 4 through 9.

Mr. Krause: No objection.

The Referee: Being no objection, they'll be offered in evidence as Exhibits 4, 5, 6, 7, 8 and 9, the same identification numbers.

(Whereupon, the documents referred to were marked and admitted into evidence as Petitioner's Exhibits Nos. 4, 5, 6, 7, 8 and 9, respectively.)

PETITIONER'S EXHIBIT No. 4

Agreement

This Agreement, made and entered into this 30th day of December, 1952, by and between Harold E. Kerry, herein called "Assignor" and Ruth B. Kerry, hereinafter called "Assignee,"

Witnesseth

Whereas, on the 28th day of July, 1952, Assignor, being indebted to Assignee in the sum of Twenty-nine Thousand Two Hundred Fifty Dollars (\$29,250), assigned to Assignee, as security for his note in said sum, Stock Certificate No. 70 for 90 shares of the common stock of West Tenino Lumber Company, and Stock Certificate No. 10, for 135 shares of the stock of West Tenino Lumber Company; and

(Testimony of Harold Edwin Kerry.)

Whereas, it is the desire of the shareholders of West Tenino Lumber Company, to dissolve said corporation; and

Whereas, Assignee is willing to allow the dissolution of said corporation provided that her security interest will be protected;

Now, Therefore, it is Mutually Agreed as follows:

1. Assignee does hereby authorize Assignor to vote his stock for the dissolution of West Tenino Lumber Company, a Washington corporation, provided that said dissolution and transfer of assets to the partnership is to be performed simultaneously therewith and the partnership is to be known as West Tenino Lumber Company.

2. Simultaneously with the release of said pledge, Assignor shall execute an assignment to Assignee of all of his right, title and interest in said partnership as additional security for the payment of said promissory note dated July 28, 1952, in the sum of \$29,250.

In Witness Whereof the parties hereto have caused this agreement to be executed the day and year first above written.

/s/ HAROLD E. KERRY,
Assignor.

/s/ RUTH B. KERRY,
Assignee.

(Testimony of Harold Edwin Kerry.)

State of Washington,
County of King—ss.

I, the undersigned, Notary Public in and for the State of Washington, do hereby certify that on this 30th day of December, 1952, personally appeared before me H. E. Kerry and Ruth B. Kerry, to me known to be the individuals described in and who executed the within instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and Official Seal this 30th day of December, 1952.

[Seal] /s/ G. M. BENNETT,

Notary Public in and for the State of Washington,
Residing at Olympia.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 5

Certificate No. 27554

United States of America
State of Washington
Department [Seal] of State

To All to Whom These Presents Shall Come:

I, Earl Coe, Secretary of State of the State of Washington, and custodian of the Seal of said State,

(Testimony of Harold Edwin Kerry.)

Petitioner's Exhibit No. 5—(Continued)

do hereby certify that the annexed is a true and correct copy of the Resolution for Voluntary Dissolution of West Tenino Lumber Company, as received and filed in this office on December 30, 1952.

In Testimony Whereof, I have hereunto set my hand and affixed hereto the Seal of the State of Washington. Done at the Capitol, at Olympia, this 12th day of March, A.D. 1954.

[Seal] /s/ EARL COE,
Secretary of State.

By /s/ RAY J. YEOMAN,
Assistant Secretary of State.

West Tenino Lumber Company
Resolution That Corporation Be Wound Up
and Dissolved Out of Court

Know All Men by These Presents:

That H. E. Kerry, C. L. Stickney and Israel Torrico, being a majority of the Directors of West Tenino Lumber Company, a corporation, hereby certify that the following is a true and correct copy of a resolution adopted by a unanimous vote of the Directors and Shareholders at a Shareholders and Directors' meeting duly called for that purpose and held on December 10, 1952, to wit:

(Testimony of Harold Edwin Kerry.)

Petitioner's Exhibit No. 5—(Continued)

“Resolved: That West Tenino Lumber Company, be wound up and dissolved out of court; that H. E. Kerry be and he is hereby designated as Trustee to conduct the winding up of the corporation in the manner provided by law; and that he is hereby authorized and directed to execute all documents and to do all things necessary to wind up the affairs of said corporation.

“Be It Further Resolved: That the dissolution be effective as of the close of business on December 10, 1952, and that the Trustee complete the transfer of all assets to the shareholders in cancellation of all of the issued and outstanding stock of the company as soon as possible, but in no event later than December 31, 1952.”

In Witness Whereof we have hereunto set our hands and seals this 10th day of December, 1952.

/s/ H. E. KERRY,

/s/ C. L. STICKNEY,

/s/ ISRAEL TORRICO.

State of Washington,
County of King—ss.

This Is to Certify that on this 10th day of December, 1952, before me, a notary public in and for the

(Testimony of Harold Edwin Kerry.)

Petitioner's Exhibit No. 5—(Continued)

said county and state, personally appeared H. E. Kerry, C. L. Stickney and Israel Torrico, to me known to be the individuals who executed the foregoing certificate and Directors of West Tenino Lumber Company, and acknowledged to me that they executed the foregoing instrument by authority and that the statements of fact contained therein are true and correct.

In Witness Whereof I have hereunto set my hand and official seal the day and year first shown above written.

[Seal] /s/ G. M. BENNETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

No. 122117

Voluntary Dissolution

Articles of Incorporation
of the

West Tenino Lumber Company

Place of business: Olympia.

Time of existence: Perpetual years.

Capital Stock: \$50,000.00.

State of Washington—ss.

Filed for record in the office of the Secretary of

(Testimony of Harold Edwin Kerry.)

Petitioner's Exhibit No. 5—(Continued)

State, December 30, 1952, at 2:00 o'clock p.m. Recorded in Book 45, Pages 294-296, Domestic Corporations.

/s/ EARL COE,
Secretary of State.

Filed at request of:

C. L. Stickney,
521 Security Bldg.,
Olympia, Washington.

Filing and recording fee, \$5.00.

Certificate mailed Jan. 8, 1953.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 6

Partnership Agreement

This Agreement of Partnership, made and entered into this 30th day of December, 1952, by and between H. E. Kerry, Charles L. Stickney, Israel Torrico and H. A. Preszler,

Witnesseth

Whereas, the parties hereto desire to form a partnership to be known as West Tenino Lumber Company;

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

Now, Therefore, the parties hereto agree that they are, by affixing their signatures hereto, general partners in the business and for the purpose and upon the terms hereinafter stated:

Article I. Name:

The firm name of the partnership shall be West Tenino Lumber Company.

Article II. Business of Partnership:

The partnership shall be for the general purpose and object of carrying on a lumber business and for the purpose of owning, renting and leasing or operating properties of the partnership. In order to carry out the purposes of the partnership, the partnership shall have the right to buy, lease, transfer or otherwise dispose of real property and to buy and sell supplies and all things necessary for the conduct of its business. The partnership may also subscribe and own, buy and sell the capital stock of any corporation and hypothecate the same; buy bonds and other securities of every type and character; borrow and loan money and charge interest therefor; and secure the payment of any debt or liability of the partnership by its bills, promissory notes, bonds, mortgages or deeds of trust, and do all acts and things necessary and convenient for the accomplishment of the objects and purposes hereinbefore set forth.

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

Article III. Principal Place of Business:

The principal place of business of the partnership shall be Tenino, Washington, or such other place or places as shall be from time to time mutually agreed upon between the partners.

Article IV. Term of Partnership:

(a) The partnership shall begin on the 30th day of December, 1952, and shall continue for a period of five (5) years.

(b) Upon mutual agreement of the partners the term of the partnership may be extended for such additional period of time as the parties may agree upon; provided that an agreement for such an extension is arrived at within sixty (60) days preceding the end of the initial five year term. If no agreement is reached within sixty (60) days prior to the termination of the initial term, then the partnership shall terminate at the end of the initial five (5) year term and shall be wound up under the provisions of the Uniform Partnership Act of the State of Washington.

Article V. Capital of Partnership:

The capital of the partnership shall consist of the assets received upon the liquidation of West Tenino Lumber Company, a Washington corporation, specifically including that certain lease originally entered into between Northern Pacific Railway Company and

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

U. S. Herrington, assigned to Thurston County Investment Company, and subsequently assigned to West Tenino Lumber Company, together with all appurtenances thereon, subject to existing liabilities, which capital shall be owned in the following proportions:

H. E. Kerry.....	45/88ths
Israel Torrico	23/88ths
Charles L. Stickney.....	17/88ths
H. A. Preszler.....	3/88ths

Additional capital contributions may be made from time to time by any or all partners as the partners shall hereafter mutually agree.

It is expressly understood that the partnership interest shall not include any loans made by any partner to the partnership, but that any such loan or loans shall be a current liability of the partnership.

Article VI. Share of Gains, Losses and Profits:

The parties hereto are to share in the net income, net losses and capital gains and losses of the partnership as follows:

H. E. Kerry.....	45/88ths
Israel Torrico.....	23/88ths
Charles L. Stickney.....	17/88ths
H. A. Preszler.....	3/88ths

At any time that the partnership shall conduct an

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

active business operation salaries shall be paid to such partners who are active in the business in relation to the reasonable value of their respective services.

Article VII. Withdrawals:

The books of the partnership are to be closed only at the end of each fiscal year or at the prior termination of the partnership and the undrawn fiscal year profits are to be credited to the profit accounts of each partner. The books of accounting are to be kept by an accountant appointed by the partnership and the records shall be open to the inspection and examination of each of the partners.

Withdrawals of profits are to be made by the partners at such time and in such time and in such amount as shall be agreed upon from time to time.

A salary paid to any partner is not to be considered a withdrawal of profits.

Article VIII. Managing Partner:

(a) It is understood and agreed that H. E. Kerry shall be the managing partner and shall be responsible for the general management of the business with the right to delegate such duties as he may see fit to any other partner or employee of the partnership.

(b) No partner shall borrow money for the part-

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

nership, but all such borrowings shall be with the unanimous consent of all partners.

(c) No partner shall have the right to loan money or any assets of the partnership to third parties or to any partner without the unanimous consent of all partners.

Article IX. Death of a Partner:

(a) In the event of the death of any partner during the term of the partnership, the partnership shall immediately terminate and the business of the partner shall be transferred to a corporation. The estate of the deceased partner shall accept the proportionate share of the capital stock of the corporation in complete settlement of his capital account in the partnership. The corporation shall be organized under the laws of the State of Washington, for the purpose of engaging in the business conducted by the partnership. The Corporation shall be organized so as to have five (5) members on its board of directors. Upon the organization of the corporation and the transfer to it of all the assets of the partnership, subject to all of its liabilities, all of the common stock of the corporation shall be distributed to the partners, including the estate of the deceased partner in the proportion in which the capital of the partnership is owned by the partners as of the date of such transfer.

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)

(b) In the alternative, however, if the surviving partners elect to do so by giving notice of their intention within ten (10) days after the death of any partner, they shall have the right to purchase the interest of the deceased partner in and to the partnership assets at the book value as of the date of death in lieu of being obliged to join in the forming of a corporation to take over the partnership assets. Payment of the interest of the deceased partner must be completed within sixty (60) days after death of the deceased partner. In the event that the parties are unable to agree upon book value, then the same shall be determined by arbitration as provided by the Uniform Arbitration Act of the State of Washington.

Article X. Amendments:

If at any time during the continuance of this partnership the partners shall deem it necessary and expedient to make any alterations in any paragraph, clause, matter or thing herein contained, for the more advantageous or satisfactory operation of the partnership business, it shall be lawful for them so to do by any writing under their joint hands endorsed on this agreement, or entered in any of the partnership books; and all such alterations shall be adhered to and have the same effect as if the same had been originally embodied in and formed a part of this agreement.

In Witness Whereof, the parties hereto have set

(Testimony of Harold Edwin Kerry.)

Petitioners Exhibit No. 6—(Continued)
their hands and seals the day and year first above
written.

/s/ H. E. KERRY,

/s/ CHARLES L. STICKNEY,

/s/ ISRAEL TORRICO,

/s/ H. A. PRESZLER.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 7

514272

Vol. 270 Page 351

Bill of Sale and Transfer of Assets

Know All Men by These Presents:

That H. E. Kerry, Trustee in Liquidation of West Tenino Lumber Company, a Washington corporation, for and in consideration of the sum of Ten Dollars (\$10), hereby sells and transfers to the undersigned the following described property of West Tenino Lumber Company, to wit: To H. E. Kerry, 45/88ths; to Israel Torrico, 23/88ths; to Charles L. Stickney, 17/88ths, and to H. A. Preszler, 3/88ths, of all of the assets of said company of every kind and nature, specifically including but not limited to all right, title and interest in and to that

(Testimony of Harold Edwin Kerry.)

certain lease originally between Northern Pacific Railway Company and U. S. Herrington, assigned to Thurston County Investment Company and subsequently assigned to West Tenino Lumber Company, together with all extentions thereto, which lease specifically covers the following property:

That portion of the Railway Company's Point Defiance Line right of way in Block 53 of Snyder & Stevens Plat of Tenino, as recorded in said county; in Seventh Street, vacated by Ordinance No. 50 of the Town of Tenino, and in unplatted portions of Samuel Davenport Donation Land Claim No. 37, in section 30, in township 16 north, of range 1 west of the Willamette Meridian lying between a line parallel with and distant 50 feet easterly, measured at right angles, from the center line of the most easterly main track of said Point Defiance Line as now constructed and a line parallel with and distant 185 feet northwesterly, measured at right angles, from the center line of the main track of the Railway company's Prairie Line as now constructed and between two lines drawn at right angles to said Prairie Line track center line from points therein distant respectively 200 feet and 560 feet northeasterly, measured along said Prairie Line track center line, from Mile Post 40,

Subject to all existing liabilities, which transfer

(Testimony of Harold Edwin Kerry.)

shall be effective as of the close of business on December 30th, 1952.

/s/ H. E. KERRY,
Liquidating Trustee.

State of Washington,
County of King—ss.

I, the undersigned, Notary Public in and for the State of Washington, do hereby certify that on this 30th day of December, 1952, personally appeared before me H. E. Kerry, to me known to be the individual described in and who executed the within instrument and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes herein mentioned.

Given under my hand and Official Seal this 30th day of December, 1952.

[Seal] G. M. BENNETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

File No. 514272

Filed for Record Dec. 30, 1952, at 1:33 p.m.

C. L. STICKNEY.

(Testimony of Harold Edwin Kerry.)

State of Washington,
County of Thurston—ss.

I, Ellis C. Ayer, County Auditor of Thurston County, State of Washington, do hereby certify that the foregoing is a true and correct copy of "Bill of Sale and Transfer of Assets." File No. 514272 as recorded in Vol. 270 of Deeds at Page 351.

In Witness Whereof, I have hereunto set my hand and official seal this 15th day of March, A.D. 1954.

[Seal] ELLIS C. AYER,
County Auditor.

By /s/ M. CAMPBELL,
Deputy.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 8

Certificate of Firm Name

Know All Men by These Presents, That the undersigned H. E. Kerry, Charles L. Stickney, Israel Torrico and H. A. Preszler, doing business at Tenino in the County of Thurston and State of Washington under an assumed name and style, do hereby certify that the designation, name and style in which said business is to be conducted is West Tenino Lumber Company; that the following named persons are all of the persons conducting or intend-

(Testimony of Harold Edwin Kerry.)

ing to conduct said business or having an interest therein, and their true and real names, together with their respective post office addresses, are as follows, to wit:

H. E. KERRY

Post Office Address.....

CHARLES L. STICKNEY

Post Office Address.....

ISRAEL TORRICO

Post Office Address.....

H. A. PRESZLER

Post Office Address.....

In Witness Whereof, we have hereunto set our hands this 30th day of December, A.D. 1952.

/s/ H. E. KERRY,

/s/ CHARLES STICKNEY,

/s/ ISRAEL TORRICO,

/s/ H. A. PRESZLER.

State of Washington,
County of King—ss.

I, the undersigned, Notary Public in and for the State of Washington, residing at,

(Testimony of Harold Edwin Kerry.)

do hereby certify that on this day of
....., 195..., personally appeared before
me H. E. Kerry, Charles L. Stickney, Israel Torrico
and H. A. Preszler, residing at the addresses above
stated, to me known to be the individuals described
in and who executed the within instrument and
acknowledged that they signed and sealed the same
as their free and voluntary act and deed for the
uses and purposes herein mentioned.

Given Under My Hand and Official Seal this 30th
day of December, 1952.

[Seal] /s/ G. M. BENNETT,
Notary Public in and for the State of Washington,
Residing at Olympia.

Filed: Dec. 31, 10:37 a.m. '52.

Recorded: Vol. 1, Page 430.

State of Washington,
County of Thurston—ss.

I, Norma Muir, Dep. County Clerk and Ex Officio
Clerk of the Superior Court of the State of Wash-
ington, for Thurston County holding session at
Olympia, do hereby certify that the foregoing is a
true and correct copy of the original as the same
appears on file and of record in my office. In Wit-
ness Whereof, I have hereunto set my hand and

(Testimony of Harold Edwin Kerry.)

affixed the seal of said Court this 12th day of March, 1954.

[Seal] /s/ NORMA MUIR,
Deputy County Clerk Thurston County, State of
Washington.

[Endorsed]: Filed March 25, 1954.

PETITIONER'S EXHIBIT No. 9

Assignment

H. E. Kerry does hereby assign and set over to Ruth B. Kerry, all of his right, title and interest in and to the partnership known as West Tenino Lumber Company, which is a partnership consisting of H. E. Kerry, C. L. Stickney, H. A. Preszler and Israel Torrico. Said assignment is substituted security for that certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28, 1952, and which security is to act as continuing security for that certain note dated July 28, 1952, until said note is paid in full.

Dated this 30th day of December, 1952.

/s/ H. E. KERRY.

[Endorsed]: Filed March 25, 1954.

(Testimony of Harold Edwin Kerry.)

Q. Now Mr. Kerry, your promissory note to Mrs. Kerry of July 28th, 1952, the one that's referred to as Exhibit number 2 for \$29,250; calling your attention to that [21] instrument, has any sum been paid by you on that instrument to Mrs. Kerry?

A. No. Nothing has been paid.

Q. Has any sum been paid by anyone to Mrs. Kerry or anyone else on that instrument?

A. No, it hasn't.

Q. So is it your testimony that the entire sum for which that note was given is still unpaid?

A. Yes.

Q. Now Mr. Kerry, as of the date that you filed your voluntary petition in this cause was the partnership which has been referred to still in existence?

A. Yes, it was.

Q. And I believe your petition was filed in this cause on October 2—October 2nd, 1953—

A. Yes.

Q. And the partnership was still a going concern, is that right?

A. Yes, it was.

Q. The West Tenino Lumber Company partnership.

Have the assets been sold yet? Has the winding up and liquidation of the partnership been completed since your bankruptcy?

A. No, it hasn't.

Q. Are any steps or negotiations in progress looking [22] towards that winding up?

A. The negotiations are in progress for the sale of the—of the mill.

(Testimony of Harold Edwin Kerry.)

Q. Yes.

There are three other partners who are not in any bankruptcy proceedings, I trust?

A. That's right.

Q. Now Mr. Kerry, are you——

The Referee: Pardon me.

You say the mill, it has not been sold?

The Witness: No, it hasn't been.

The Referee: Mr. Stickney called me about a week ago and said they were selling it that day.

Mr. Grunke: Well, it's like the sale of most mills. A sale today sometimes takes 6 months or 2 months.

Q. Now Mr. Kerry, are you personally familiar with the mill and its assets——

A. Yes, I am.

Q. And its equipment?

Have you operated the mill?

A. Yes, I've operated it for the last year and a half.

Q. Are you familiar with lumber mill and resaw mill values? A. Yes.

Q. What type of a mill is this West Tenino mill? [23]

A. This is a remilling plant consisting of a resaw, and a planer, and a dry kiln and the other equipment, necessary equipment that goes with it.

Q. It doesn't take logs and manufacture them into lumber; it's a remilling you say?

A. Remilling. It buys lumber and resaws it and finishes it.

(Testimony of Harold Edwin Kerry.)

Q. Now Mr. Kerry, are you familiar with values of mills? A. Fairly well.

Q. What has been your connection with the lumber and milling business, generally?

A. I've been in the lumber business practically all of my life, since nineteen—my business life since 1921.

Q. Can you tell us what the value of your partnership interest in this West Tenino—well, maybe I should ask you what the value, the net value of the mill itself is?

A. Well if you're referring to book value for one thing——

Q. Well why don't you give us the book value as of the present time?

A. Well, the net book value of the—of the mill on today's figures according to the account is \$46,519.29.

Q. And what—and since your ownership is 51 and some fraction per cent, what is the value then of your interest in that figure?

A. It's \$23,785. [24]

Q. And what is the——

The Referee: Wait a minute. Pardon me. Go ahead, please.

The Witness: Twenty-three thousand seven eighty-five.

Q. And what do you mean by "book value"?

A. Well, it's the cost less the depreciation, then the receivables and liabilities taken out as well.

(Testimony of Harold Edwin Kerry.)

Q. Are the figures you have just given based on market value then or something else?

A. No. Those are merely book values. The market value is based upon the offer that has been made of \$50,000, which would be considered the market value, and that's the best offer that's been made. The only offers that have been made are two of them, \$50,000. It brings the net worth of the mill on a market value basis of \$42,865.83.

Q. And on that basis what would be the value of your partnership interest?

A. My partnership interest in that case would be \$21,917.

Q. And Mr. Kerry, how do you—are you familiar at all with the books and records of the partnership to obtain book values and the likes of that?

A. Only insofar as the statements are made up, and I look at them. [25]

Q. In other words, you get the statement regularly as a partner? A. Yes.

Q. And those figures you have given are based on that? A. On the accountant's figures.

Q. That's the book value figures? A. Yes.

Q. Now, on the market value figures you stated that you based that on the fact there had been an offer or two offers for purchase at \$50,000. Is that the purchase of what?

A. That's the purchase of the mill assets.

Q. And have there been any higher offers?

A. There have been no other offers.

(Testimony of Harold Edwin Kerry.)

Q. Has there been an attempt to find buyers for the mill? A. I think so.

Q. Well, you know, don't you, whether there have or not?

A. Well, I think some of the other partners have tried to find other buyers for the mill.

Q. Are you aware of whether or not there might be other possible buyers than those two offers you referred to?

A. There are none that I know of at all.

Q. Do you think it is possible to get a higher price for the mill than the \$50,000 referred to?

A. No, I don't. [26]

Q. In other words, you think that's a reasonable market value, do you?

A. Yes, that's a good price.

Q. A good price.

Mr. Kerry, in the first pledge agreement, the July pledge agreement to Mrs. Kerry that you referred to, July, '52, you mentioned a pledge of West Tenino stock and Olympic Stud Mill stock. And now in the pledge agreement in December of '52 was the Stud Mill stock again pledged or was that left out of the second one?

A. That was left out of the second pledge.

Q. So that the pledge in December of '52 covered only—— A. The West Tenino——

Q. ——partnership——

A. ——partnership interest.

Q. I see.

But the Stud Mill pledge was given up at that

(Testimony of Harold Edwin Kerry.)

time, is that right? A. Yes.

Mr. Grunke: I have no further questions of Mr. Kerry. [27]

Cross-Examination

By Mr. Krause:

Q. Mr. Kerry, on October 2nd, 1952, you signed a schedule setting forth a summary of your debts and assets listing your debts at \$138,148.07 and your assets at \$13,665.89. Now, that was your true financial condition at that time, was it?

A. Well, I'll have to look at that statement to see what that is. Was that filed in the bankruptcy court, the federal file?

Q. Yes, this—all of the schedules that you filed in the bankruptcy court including the amended schedule that you filed somewhat later reflect the true—reflect your true position on October 2nd, 1952?

A. There were a great many conditional liabilities in there—contingent liabilities in there which might or might not—it was just a fair possibility that some of them might be liabilities and they were put in for that reason. Some of them claimed it, but I'm not at all sure that they were liabilities.

Q. You were insolvent on the date that you filed the petition?

A. I don't—on the day I filed the petition?

Q. Yes. And the day you signed the petition. [28]

A. (No response—pause.)

The Referee: Will you answer the——

The Witness: Yes, I was.

(Testimony of Harold Edwin Kerry.)

Q. Now, handing you Plaintiff's Exhibit number —Petitioner's Exhibit Number 1, which is a promissory note, dated the 15th day of August, 1950, wherein Seattle First National Bank as executor of the payee; I note on the back that it shows payments of \$1,000.00 on the 26th day of April, 1951, six thousand five hundred on the 16th day of May, 1951, and two thousand five hundred on the 28th day of September, 1951, and five thousand on the 5th day of May, 1952, making a total of \$15,000.00. And you say that the true balance on this note at the time it was paid was \$29,250.00. Now, it reads twenty-nine thousand two hundred and fifty——

A. \$29,250.00 is the figure that the bank agreed to take for a settlement of the indebtedness.

Q. Well, was the indebtedness greater at that time?

A. According to this note it was greater, yes.

Q. Well, was it actually greater?

A. I feel quite sure that the note was for the indebtedness if I understand the terms.

Q. The principal balance on the note was \$60,000.00 and they settled for approximately half?

A. That's correct. [29]

Q. You did owe the full \$60,000.00 then; there was nothing else involved?

A. No, nothing else involved.

Q. I'll hand you Petitioner's Exhibit number 9 which purports to be an assignment of your interest in the partnership in the West Tenino Lumber Company to Ruth B. Kerry, that the statement

(Testimony of Harold Edwin Kerry.)

says that: "The assignment has substituted security for a certain pledge agreement entered into between H. E. Kerry and Ruth B. Kerry, dated July 28th, 1952, in which security was to act as a continuing security for that certain note dated July 28th, 1952, until such note is paid for."

I ask you if this assignment was ever recorded or if there's an affidavit with this state in connection with it?

A. I don't think I can answer that question. This was made up by Bogle, Bogle & Gates and just what was done with this, I'm not too sure.

Q. You have no files recorded or—as far as you know that's the complete instrument?

A. As far as I know it's complete.

Mr. Grunke: It is. That's the complete instrument. It's not a recorded document or file copy.

Q. And this so-called assignment was merely given for the purpose of securing the balance due—purportedly due [30] Ruth B. Kerry at that time?

A. Yes.

Q. It was the security of——

A. For securing that ninety—\$29,250.00.

Q. I see.

Now, I note that you were referring to Petitioner's Exhibit number 2 which is the promissory note in the amount of \$29,250.00 payable to Ruth B. Kerry. You received that amount from Ruth B. Kerry at that time?

A. No, the bank received that amount——

Q. The bank received that amount?

(Testimony of Harold Edwin Kerry.)

A. —in payment of the—in payment of my—

Q. How did Ruth B. Kerry pay that amount, or do you know?

A. On a cashier's check made out to the bank.

Q. And where did the money come from for which to pay the cashier's check?

A. It came from her own money that she had before we were married.

Q. Now, I'm asking you where it came from, not how much money it was.

A. It came from securities which she sold at that time.

Q. From securities that were sold at that time?

A. Yes.

Q. And what securities were they? [31]

A. I don't recall just which ones they were.

Q. Were they sold through a broker?

A. I think they were sold to Frederick, Morford and—Security Company in the 1411 Building in Seattle.

Q. Do you know of any receipt—was there a receipt from the broker at the time these securities were sold, to substantiate your testimony that such securities actually were transferred?

A. I think there was such a—they always send out such a statement.

Q. And do you have that statement?

A. I don't have it here. I don't know whether Mrs. Kerry has it at home or not. It can be easily verified.

(Testimony of Harold Edwin Kerry.)

Mrs. Kerry: I can get them.

Q. When were these security—securities purchased, if you know?

A. Mrs. Kerry could tell you better than I can on that if she has the record with her.

Q. In whose name were the securities?

A. Mrs. Kerry.

Q. In the name of Ruth B. Kerry?

A. If she had them—did you have the name changed over to Ruth B. Kerry—

Q. (Interrupting): Well, do you know?

A. No, I don't know. [32]

Q. You don't know anything about that.

Do you know if any of this \$29,250.00 which was paid for the cashier's check ever went through any bank account, either of yours or Mrs. Kerry?

A. It didn't go through mine. I don't know whether she put it through the bank account. I believe the cashier's check was made up by the People's National Bank in Seattle, if I remember correctly.

Mr. Grunke: We'll have further evidence on that, counsel.

A. That's where her account was.

Q. Handing you Petitioner's Exhibit number 6, which purports to be a partnership agreement, I'll ask you if Ruth B. Kerry is a partner to this partnership agreement or at any time ever did become a party to the partnership?

A. No, she didn't.

(Testimony of Harold Edwin Kerry.)

Q. I'm handing you Petitioner's Exhibit number 7, which is a bill-of-sale transferring the property formerly owned by the West Tenino Lumber Company, a Washington corporation, to certain individuals. All of this property was transferred to you, H. E. Kerry, Israel Torrico, Charles L. Stickney and H. A. Preszler. Did Mrs. Kerry's name ever appear in any of the transferring of any of this property? [33]

A. No, I don't think so.

Q. Handing you Petitioner's Exhibit number 8, which purports to be a certificate of firm name; that's the certificate that was filed in the clerk's office in Thurston County, is it?

A. Yes.

Q. I note that this states that: "H. E. Kerry, Charles L. Stickney, Israel Torrico, and H. A. Preszler, doing business in Tenino in the County of Thurston and State of Washington under an assumed name which styles are hereby certified that the designation, name and style under which said business is to be conducted is the West Tenino Lumber Company; that the following-named persons are all the persons conducting or intending to conduct said business or having an interest therein. And their true and real names, together with their respective post offices, are as follows:" And then it sets forth the names of the several different parties to the certificate.

Of your knowledge, has there been any kind of a certificate filed for Ruth B. Kerry showing that she has an interest in this West Tenino Lumber Company?

(Testimony of Harold Edwin Kerry.)

A. No, I don't think so. She had no interest in the—in the West Tenino Lumber Company as such as I understand the transaction. She was the pledgee of my interest. [34]

Q. She was a pledgee of your interest?

A. Yes.

Q. Then Mrs. Ruth B. Kerry never had anything to do with the partnership aside as shown in these different instruments in the several exhibits which have been admitted?

A. No, she was never a partner.

Q. She was never a partner? A. No.

Q. Nor did she ever have possession of any of the assets? A. No.

Q. Did she ever exercise any control or manage the partnership in any manner whatsoever?

A. No.

Q. What was delivered to her in the way of a pledge? What property was ever delivered to her in the way of a pledge?

Mr. Grunke: If the Court please, I think we're getting into some questions here that are really legal questions and intend to be legally argumentative. I think the documents speak for themselves. You can ask what documents were delivered or what assets were delivered. I don't think that we should get these long questions that tie in so many legal conclusions with them. These facts pretty well speak for themselves. [35] It will be a matter of legal argument when we get through.

The Referee: I will sustain your objection with

(Testimony of Harold Edwin Kerry.)

one qualification, that is you just want to show that she took no active interest and had nothing to do with the partnership.

Mr. Krause: That's right.

Mr. Grunke: We grant that.

Mr. Krause: You can state that.

Mr. Grunke: That she did not take action. Mrs. Kerry did not take an active interest in the management of partnership affairs, and did not have physical possession of partnership assets.

Mr. Krause: And no assets were ever delivered to her.

Mr. Grunke: No. No partnership assets were delivered to her.

Q. Mr. Kerry, you were the manager of this partnership? The West Tenino Lumber Company?

A. Yes, I should say that that would be correct.

Q. And as manager of the West Tenino Lumber Company all of the assets of the company were in your possession?

A. Well, I can't answer that question whether I would have possession of the assets or not.

Mr. Grunke: I think that again, your [36] Honor, is a legal question.

The Referee: Objection will be sustained.

Q. Well, what would you do in connection with the partnership? A. The partnership affairs?

Q. Yes.

A. Under our partnership agreement I would have the controlling, say, of it just as we did in the corporation.

(Testimony of Harold Edwin Kerry.)

Q. You were the manager.

What were the assets of the partnership?

A. The assets of the partnership were the mill at Tenino.

Q. And did you own the real property?

A. No.

Q. Whom did own the real property?

A. The Northern Pacific Railroad Company from whom we leased.

Q. From whom you leased? A. Yes.

Q. The partnership and you as one of the members of the partnership, owned the lease?

A. Owned the lease and the physical assets of the mill.

Q. As a lessee? A. Yes.

Mr. Grunke: As a partner. Go ahead.

A. The property as a lessee. That's the real estate, I [37] mean, as a lessee.

Q. Now, did you own any other assets?

A. No, none that I know of.

Q. Well, weren't there any physical properties aside from the lease that was owned by the partnership?

A. Well, yes, physical assets at the mill, yes.

Q. And what were those physical assets?

A. They were numerous; consisting principally of a resaw and necessary sorting chains, a planer, dry kiln, Bellows carrier and a fork lift, office building, dry planing shed, dry shed and planing shed combined. That's the principal assets.

(Testimony of Harold Edwin Kerry.)

Q. Did this West Tenino Lumber Company actually operate the mill?

A. No. The West Tenino Lumber Company leased the mill.

Q. Was that continuously from December 30th of 1952 until you filed your petition in bankruptcy?

A. Yes, that was continuous from the time we purchased the mill until the present time, in fact.

Q. In other words, if I understand this correctly, the West Tenino Lumber Company was the lessee of the real property from the Northern Pacific Railway and that the Tenino Milling Company was the lessee from the West Tenino Company as to the principal property and including both the real and personal property? [38]

A. Yes, the West Tenino Lumber Company as the owner of the mill and as the lessee of the real property leased the mill to the Globe Milling Company at one time which consisted of two of the partners and then later leased it to one of the partners under the name of the Tenino Milling Company.

Q. Were these leases executed prior to December 30th, 1952, or after?

A. These leases were executed prior to December 30th, 1952.

Q. But the Tenino Milling Company was the only lessee as far as the West Tenino partnership was concerned?

A. Well, it was at that time, but prior to that it had leased it to the Globe Milling Company. There

(Testimony of Harold Edwin Kerry.)

were two different periods in there, two different leases.

Q. But the lease to the Globe Milling Company had terminated before this partnership was formed? A. Yes.

Q. Did you have insurance upon the property—— A. Yes.

Q. ——of the West Tenino Lumber Company?

Do you know if the name of Ruth B. Kerry appears as having any insurable interest in that insurance? A. No, I don't think it did.

Q. It did not. [39]

The income of the West Tenino Lumber Company was the rents received from the Tenino Milling Company? A. Yes.

Q. And what happened to these rents?

A. These rents were paid out in various expenses and distributed.

Q. Distributed to whom?

A. Distributed to—I'm not sure whether it's any definite—actual distribution to any of the partners or not, but it's practically all paid out in paying off obligations of the West Tenino Lumber Company.

Q. And you as manager had control of who was paid and so on? A. Yes, we all agreed on that.

Q. By "all," you mean the——

A. All the four partners.

Q. All four of the four partners and not referring to Mrs. Kerry? A. No.

Q. Did you say that you were generally familiar

(Testimony of Harold Edwin Kerry.)

with the financial condition of the partnership at all times? A. Yes.

Q. Was there a surplus in this partnership at all times?

A. Well, I don't think so if you would consider the liabilities there, there probably was not. You'd have [40] to refer to the books to determine that. I don't actually recall at the time. I don't have them here now.

Mr. Grunke: I believe, Mr. Krause, I might interject. Ask him about surplus. Are you referring just to net earnings or total assets over liabilities?

Q. I was going to. Did your net assets at all times exceed your liabilities?

A. Not at all times. No, because we were paying off certain obligations there that came with the——

Q. I'm not referring to your income. I'm referring to your total assets.

A. Oh, yes, the assets would exceed the liabilities.

Mr. Krause: That's all.

The Referee: Just one question.

The assets of the business at the present time, you say, could be sold for some—your interest, \$21,917.00, that's the value of it. Are there any liabilities or is that the net involved in there?

The Witness: This is the net.

The Referee: This thing boils down after all the bills are paid you would receive that. I mean, your interest would receive that out of the sale if it's sold? [41]

(Testimony of Harold Edwin Kerry.)

The Witness: Yes, that's correct.

Mr. Grunke: I have no further questions of this witness.

The Referee: You may be excused.

(Witness excused.)

Mr. Grunke: Mrs. Kerry, please.

The Referee: Well, at this time we'll take a 5-minute recess.

(Recess.) [42]

The Referee: The court will again be resumed.

RUTH B. KERRY

called as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grunke:

Q. What is your name, please?

A. Ruth B. Kerry.

Q. And that's spelled K-e- double r-y?

A. That's right.

Q. You're the wife of Harold E. Kerry?

A. I am.

Q. He's the person who just testified here?

A. Yes.

Q. And how long have you and Mr. Kerry been married? A. It was '48.

Q. 1948? A. That's right. June.

Q. And, Mrs. Kerry, prior to that were you living in the State of Washington?

(Testimony of Ruth B. Kerry.)

A. No, I was not. [43]

Q. Where was your home prior to June, 1948?

A. Ohlman, Illinois.

Q. And you moved out here after you were married, then, is that right? A. That's right.

Q. And you've been living here ever since?

A. Right.

Q. Mrs. Kerry, calling your attention to the summer of 1952, July, 1952, do you recall some transactions regarding stock of Mr. Kerry, that you had? A. Yes, I do.

Q. Just in your own words, in a general way, will you tell us what transpired, what occurred?

A. Well, Mr. Ransom called up and said he wanted to call the—or wanted to get rid of the shares that was pledged to him at the bank. And Mr. Kerry didn't have the funds at the time and I said, "Well, I'll sell some of my stock and securities and get it out for you."

Q. The Mr. Ransom you refer to is whom?

A. He's at the First National Bank in Seattle, the Trust Company. The Trust Department.

Q. Following that, what did happen? Did you——

A. Well, I went down to the bank and I drew out part of—got my securities out of the box and took it over to Badgley, Frederick, Morford & Rogers, I think the name [44] of the place is. And Mr. Badgley took care of it and sold the securities. That's how I got the money for it.

Q. And what were done with the funds from the

(Testimony of Ruth B. Kerry.)

sale of the securities? Did he give you a check or did you deposit them in some account, or what happened?

A. In the Peoples National Bank. I had it deposited there and drew a check—wrote a check out to the First National Bank for the——

Q. Mrs. Kerry, showing you what has been marked for identification as Petitioner's identification number 10, can you tell us what that check relates to?

A. It relates to the amount that had to be paid to the First National Bank.

Q. I see. And that check is drawn by you, is it?

A. Right.

Q. On what bank now is it drawn?

A. You mean what bank it was? It was the securities.

Q. Yes, and on what bank?

A. Peoples National Bank.

Q. And it's made payable to whom?

A. Made payable to the Peoples National Bank of——

Q. Washington? A. ——Washington.

Q. And what did they give you for that check that you made [45] payable to them?

A. A cashier's check.

Q. They gave you a cashier's check.

To whom was the cashier's check payable?

A. To the First National Bank.

Q. And do you have that cashier's check, or was that delivered to the bank in Seattle?

(Testimony of Ruth B. Kerry.)

A. That was delivered to the Seattle Bank.

Q. And it did not come back to you, did it? The cashier's check—this check came back to you but the cashier's check drawn, of course, did not, did it?

A. No.

Q. And you do not have that cashier's check—

A. No.

Q. —or cancelled checks here today.

The securities that you refer to that were sold to raise that \$29,250.00, what—where did you get those securities?

A. Why, from my former husband after he'd passed on. It was left to me.

Q. And approximately when did you, as a result of acquiring them from your former husband's estate, obtain the securities? I mean, when did they become yours? A. Well, they—

Q. When was the estate probated, approximately what year? [46]

A. It may have been some stock I bought after I got out here, because after I sold my house back there I—I had some—well, I bought some securities in—

Q. In other words, the—

A. —'38. That's the year that Mr. Watkins died, in May, '38.

Q. So you purchased from property that you inherited from your prior husband. You either got those securities or purchased some from time to time, is that right? A. That's right.

Q. Were any of those securities purchased from monies that you earned by working after your mar-

(Testimony of Ruth B. Kerry.)

riage to Mr. Kerry? A. No, sir.

Q. Have you had any employment since your marriage to Mr. Kerry? A. No.

Q. Were any of these securities purchased from any funds which Mr. Kerry may have given you?

A. No.

Q. To what extent, if at all, did you keep your money or your properties from your former marriage separate from these, if you did, can you explain to us?

A. I kept my funds in a separate bank, and I also have received money from a trust account, trust fund.

Q. Where is the trust—— [47]

A. In the St. Louis Union Trust Company in St. Louis, Missouri.

Q. Then when you receive those funds from the trust fund, where do they go? In the family bank account or—— A. No, sir, in my own——

Q. In your own bank?

A. In my own fund—own account.

Q. Has there been any commingling of the funds whatever? A. Never.

Q. Did any portion of the twenty-nine thousand two hundred and fifty come from money furnished directly or indirectly by Mr. Kerry? A. No.

Q. It all came from your own separate funds, is that right? A. That's right.

Q. Now, let's see, and this check is dated July 28th, 1952. Do you know whether that was the day on which you actually picked up the cashier's check or purchased it?

(Testimony of Ruth B. Kerry.)

A. That's the day I picked it up.

Mr. Grunke: We'll offer identification 10 into evidence.

Mr. Krause: No objection.

The Referee: No objection, the Petitioner's identification 10 will be admitted into evidence as exhibit—Petitioner's Exhibit 10. [48]

(Whereupon, the check referred to was marked and admitted into evidence as Petitioner's Exhibit No. 10.)

PETITIONER'S EXHIBIT No. 10

[Check]

Main Office

Peoples National Bank of Washington

No.

19-10

1250

Seattle, Washington, July 28, 1952

Pay to the Order of Peoples National Bank of Washington \$29,250.00.

Twenty-nine thousand two hundred fifty and no/100 Dollars.

/s/ RUTH B. KERRY.

[Initialed]: D.

[Perforated]: 19 PD 10.

7-28-52.

[Endorsed]: Filed March 25, 1954.

(Testimony of Ruth B. Kerry.)

Q. Did you owe any money to Mr. Kerry on July 28, 1952? A. No.

Q. You had not borrowed any from him or for any other reason owed him any money?

A. No, indeed.

Q. Were you holding any money of his in any way, shape or form in July of 1952?

A. Never.

Q. Calling your attention, Mrs. Kerry, to certain documents which Mr. Kerry referred to when he was on the witness stand, and particularly Petitioner's Exhibit number 2, can you tell us—do you recognize [49] that document? A. Yes, I do.

Q. And what is it? A. It's a—a note.

Q. Is it the note Mr. Kerry gave you—

A. That's right.

Q. —for the \$29,250.00?

A. It's a note for twenty-nine thousand two hundred and fifty.

Q. And then in Petitioner's Exhibit 3, do you recognize [49] that document? A. Yes, I do.

Q. And just in a general way, what is that document?

A. It's a pledge for the shares of the West Tenino and the Stud Mill.

Q. And that was—this is the pledge you have been referring to in July of 1952?

A. '52, in payment of the twenty-nine thousand two hundred fifty.

Q. And showing you Petitioner's Exhibit num-

(Testimony of Ruth B. Kerry.)

ber 9, a document entitled "assignment," are you familiar with that document? A. Yes.

Q. And can you tell us what it is?

A. That is the—this is in the partnership.

Q. Is this the assignment of the interest in Mr. Kerry's partnership—

A. For his interest in the West Tenino Lumber Company.

Q. And that was in December what?

A. 30th.

Q. '52? A. '52.

Q. And were you familiar with the transaction whereby you acquired values—that assignment of the values that's in the partnership? [50]

A. Yes, I was.

Q. And calling your attention to Plaintiff's Exhibit—

Mr. Grunke: Let's see, should this number be 4 or 5?

The Referee: That should be 4. Identification 4 should be Exhibit 4.

Mr. Grunke: Yes.

Q. Calling your attention to Plaintiff's Exhibit 4, an agreement dated December 30th, 1952, are you familiar in a general way with that agreement?

A. Yes.

Q. And it relates to the same transaction Exhibit 9— A. Same transaction as the—

Q. Exhibit 9? A. —number 9.

Q. And in a general way, what was the arrange-

(Testimony of Ruth B. Kerry.)

ment in December of 1952 that that agreement relates to?

A. Well, the partnership was—after the corporation had changed to a partnership, why, I was to—Mr. Kerry was to take over the—my interest in the partnership and operate it.

Q. In other words, he was—the corporation had to substitute a proper rate of interest for his corporate stock, isn't that right?

A. That's right. [51]

Q. And was the Olympic Stud Mill stock by that agreement continued under the pledge or was that dropped?

A. The what?

Q. The Olympic Stud Mill stock.

A. No, the Olympic Stud Mill was dropped.

Q. Was the Olympic Stud Mill still in existence at that time, as far as you know, in December of '52, or are you familiar with it?

A. Oh, no.

Q. Now, Mrs. Kerry, has any amount ever been paid to you on the note, which is Exhibit 2?

A. No.

Q. Is the entire amount still unpaid?

A. That's right.

Q. Have you received any funds from anybody other than Mr. Kerry in payment on that note?

A. No, sir.

Q. Is Mr. Kerry indebted to you on other obligations in addition to that one?

A. Yes.

Q. Now, they're not secured though by this pledge, are they?

A. No, not in any way.

Q. And on the note, Exhibit 2, I notice that there

(Testimony of Ruth B. Kerry.)

is written in an interest rate of 5 per cent. Do you know whether that was at the time the note was signed or at [52] some other time?

A. That was at the time the—the note was signed.

Q. Yes, it was there when the note was signed—— A. Yes.

Q. ——and delivered to you? A. Yes.

Mr. Grunke: I should call the Court's attention to an error in our petition. I mentioned 6 per cent in our petition, which is a typographical error.

Q. Mrs. Kerry, was a statement furnished to you by the brokers who sold the securities, do you know? A. Well, it—it was, but——

Q. Did you retain it? A. No, I didn't.

Q. You don't——

A. I'm sure I could get it from Mr. Badgley.

Q. Yes, you think you could get a copy, but you didn't keep a copy, yourself?

A. No. It may be in my books, I don't know, I'm——

Q. Is it your testimony then that you did give consideration in July of 1952 for the pledge to you on that date? A. Yes.

Q. And the consideration was what?

A. Twenty-nine thousand five hundred. [53]

Q. Two fifty?

A. Twenty-nine thousand two hundred and fifty.

Q. And when the document—when the pledge of the partnership interest was executed in December of '52, what, if anything, did you get for that? Or what was the consideration or reason for that?

(Testimony of Ruth B. Kerry.)

A. I didn't give anything for that, I don't think.

Q. You didn't give any further cash at that time? A. No.

Q. You simply relinquished the——

A. Just exchanged.

Q. Yes, you exchanged one security for another?

A. That's right.

Q. And you relinquished, I believe you testified, the Olympic Stud Mill stock—— A. Yes.

Q. ——at that time.

Do you have at the present time any assets or property or money belonging to Mr. Kerry?

A. No, sir.

Mr. Grunke: I have no further questions.

The Referee: You may inquire. [54]

Cross-Examination

By Mr. Krause:

Q. Mrs. Kerry, I believe in the previous hearing you testified that in May of 1952 a certain Cadillac automobile was transferred to you by Mr. Kerry as part payment upon a promissory note. Do you remember that testimony? A. Yes, I do.

Q. Was that in payment of the promissory note that's involved in this—— A. No.

Q. ——proceeding at this time?

A. No, it was not.

Q. That was not—that was another note?

A. That has nothing to do with this.

Q. Mrs. Kerry, do you have an independent

(Testimony of Ruth B. Kerry.)

recollection as to what securities were sold in July, 1952?

A. I haven't—oh, dear, some General Mills and some—do you mean that kind of security?

Q. Do you know what the securities were?

A. I don't know that I understand what you mean.

Q. Do you know what securities you sold?

Mr. Grunke: Do you mean, do you mean what companies her securities are from?

Q. What companies are they from? [55]

A. Well, there's some General Mills and Phillip Morris and——

The Referee: I believe you have stated you would authorize the broker to give you a copy of that sale.

The Witness: I can get it.

Mr. Grunke: Yes, we'll authorize—we'll either obtain it or get her authorization and give it directly to the trustee.

The Witness: I can't remember right off.

Q. Do you have any present recollection as to when this stock was acquired by you? If some of it was acquired subsequent to June, 1948, when you were married to Mr. Kerry? A. Yes, it was.

Q. It was acquired subsequent to June of 1948?

A. That's right.

Q. And the proceeds from this sale were deposited in this bank account in the Peoples National Bank? A. That's right.

Q. And that was a bank account in your name?

(Testimony of Ruth B. Kerry.)

A. That's right.

Q. Was it in your name alone? A. Alone.

Mr. Krause: No further questions. [56]

The Referee: Do you wish the witness any further?

Mr. Krause: No, sir.

The Referee: Do you have any recross?

Mr. Grunke: No further questions.

The Referee: You may be excused. Thank you.

(Witness excused.)

Mr. Grunke: If the Court please, we'll rest on this one.

Mr. Krause: I will call Mr. Stickney. [57]

CHARLES L. STICKNEY

called as a witness on behalf of the Trustee, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. Your name is Charles L. Stickney?

A. Yes, sir.

Q. And you're a certified public accountant?

A. Yes, sir.

Q. Mr. Stickney, did you keep the books and records of the West Tenino Lumber Company subsequent to the formation of the partnership in December of 1952? A. Yes, sir.

Q. I'll ask you if at all times subsequent to the

(Testimony of Charles L. Stickney.)

formation of that partnership there was a surplus?

Did the assets exceed the liabilities?

A. Yes, sir.

Q. It was Mr. Kerry's testimony that at this time his interest in the partnership would be approximately \$21,000.00 book value?

A. That was Mr. Kerry's testimony.

Q. Yes. Whether or not that is exactly right is the interest in the company, interest in the surplus would be—reach several thousand dollars, would it not? [58]

A. It would be several thousand dollars, yes.

Q. Probably exceed \$10,000.00?

A. Yes, sir, it would.

Q. And at all times between December 30th, 1952, and October 2nd, 1953, the time of filing this petition in bankruptcy, did he likewise have his interest in the surplus worth more than \$10,000.00?

A. Yes, sir. As far as our record showed.

Q. Did Mrs. Kerry's name appear in any place on the books and records in the company?

A. No, sir.

Q. Was any instrument ever filed by Mrs. Kerry or anyone in her behalf showing an assignment to her?

A. Not—not with me.

Q. And you were the one that had charge of all of the books and records of the partnership?

A. Yes, sir.

Mr. Krause: That's all.

(Testimony of Charles L. Stickney.)

Cross-Examination

By Mr. Grunke:

Q. Mr. Stickney, did Mr. Kerry's interest—or let's say at the present time, would Mr. Kerry's interest to the best of your recollection in the books and records [59] exceed this \$21,000.00 that he testified to or twenty-two thousand, I forget the exact figure?

A. Well, we have a point in dispute, an offset that I'm claiming against rent that I have still unpaid of \$7,000.00. But other than that offset his testimony is substantially the situation at the present moment. We still have bills to come in possibly.

Q. And the offset you're speaking of would tend to increase or reduce his interest?

A. It would reduce his to the sum of \$7,000.00.

Q. Yes, so that his would drop from some twenty-one or twenty-two thousand to fourteen or fifteen, if your point is sustained?

A. Yes, that's correct.

Mr. Krause: That's my understanding, too.

Q. So that the value of Mr. Kerry's interest does not exceed the sum he testified to. Not greater by any chance than the sum he testified to?

A. No, sir.

Mr. Krause: That's the book value?

The Witness: That's the book value.

Q. And as of October 2nd, 1952, was there any substantial difference in the book value of the assets?

A. Not very much.

(Testimony of Charles L. Stickney.)

Q. Between then and now? [60]

A. Not but—not but very little.

Q. In fact, as a matter it may be a thousand dollars or two or——

A. Well, the rent accrues at—the rent accrued at the rate of fifteen hundred a month and we had insurance, depreciation and other charges against it.

Q. Well, if anything, the book value was probably less in October because rent has accrued since that time.

A. Yes, sir, there has been some book profit since then.

Q. Sure. So that in October the value would be then even less than it is as of today?

A. Yes, sir.

Mr. Grunke: I have no further questions.

The Referee: Was there any knowledge or record of any instruments of any kind conveyed to the officers of the corporation that this stock had been pledged to Mrs. Kerry?

The Witness: I had informal knowledge that Mr. Kerry had told me that he had pledged his stock. When he first pledged it I didn't know who it was pledged to. Later on he told me to his wife.

Q. And you were active in the corporation, also, were you not?

A. Yes, sir. The four of us have been active right straight through. [61]

Mr. Grunke: I have no further questions.

(Testimony of Charles L. Stickney.)

Redirect Examination

By Mr. Krause:

Q. Was that information filed with any of the records of the corporation?

A. As to this assignment?

Q. Yes. A. No.

Q. You just had personal knowledge of it, not as an officer of the company?

A. Well, I don't know in what capacity you call it personal knowledge. Mr. Kerry told me.

Mr. Grunke: That's a conclusion anyway. You don't know which hat you had on that day?

The Witness: No, I don't.

Mr. Grunke: Very well.

The Referee: Was that true also of the partnership?

The Witness: He discussed the matter before the dissolution and he was assured by Bogle, Bogle & Gates that Mrs. Kerry would be protected in her security. That was my understanding——

The Referee: In other words, all the [62] partners knew that this stock was pledged to Mrs. Kerry?

The Witness: Yes, we knew it. Later the partnership interest.

Mr. Grunke: No questions.

Q. Did you have that knowledge on December 30th, 1952, or was it later?

A. I couldn't tell the exact date that he told me. It was after the corporation was informed and I

(Testimony of Charles L. Stickney.)

think—if I recollect correctly before the corporation was dissolved. I am not certain.

Q. But you knew that the corporate stock was pledged before——

A. I knew it was pledged but I didn't know who to until, as I said, Mr. Kerry told me later.

Q. And was that the extent of your knowledge that you just knew that the corporate stock was pledged?

A. Yes, I knew that the partnership interest that was substituted for the stock was pledged.

Mr. Krause: That's all.

Mr. Grunke: No questions.

(Witness excused.)

Mr. Krause: Call Mr. Schneider. [63]

JOSEPH R. SCHNEIDER

called as a witness on behalf of the Trustee, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Krause:

Q. Your name is Joseph Schneider?

A. Joseph R. Schneider, S-c-h-n-e-i-d-e-r.

Q. And you are the trustee in this proceeding?

A. Yes.

Q. And as trustee do you have the—have the books and records of Mr. Kerry been turned over to you?

A. Of the H. E. Kerry Company, yes.

Q. I see.

(Testimony of Joseph R. Schneider.)

A. And the personal records that he's given me, his personal bank accounts and so on.

Q. And have you made an examination of all of those records? A. Yes, I have.

Q. And from that examination were you able to determine whether or not Mr. Kerry was solvent on the 28th day of July, 1952?

A. Not exactly on as of that date. I have used as for a basis of making the determination a statement which he submitted to the Seattle First National Bank on August the 31st, 1952. The reason for that is this: That [64] prior to the time—well, from the time that Mr. Kerry's partner, John X. Johnson, died and he had to assume these obligations, there were some ninety thousand dollars of obligations in a Canadian arrangement that had to be taken care of and there was also the \$75,000.00 that was to be paid to Mr. John X. Johnson's estate for his partnership equity.

His affairs were quite heavily involved and he showed an operating deficit in April and March along in '52 there and all the way through pretty much. That was occasioned by the fact that there had been substantial losses at Lake Stevens Mill and the mill had burned. It had been sold and there were money funds due from the insurance company there. Mr. Kerry was the liquidating trustee and had assumed all the responsibilities.

The Canama Lumber Company had failed in Canada with substantial losses to Mr. Kerry of approximately \$85,000.00 and the—he had become in-

(Testimony of Joseph R. Schneider.)

involved—rather had become interested in an organization known as the Wendell Pine Mills of Idaho, and, of course, the Olympic Stud Mill. And the West Tenino Company, he had been in that. That company had not been profitable but it also—but it had been maintaining its equilibrium and was paying off its [65] obligations. The other companies were all in financial trouble.

So that he was quite involved and his financial position was improved materially by this composition of the debt with the John X. Johnson estate, which in effect was a gain of \$31,000.00.

Q. This composition that you are referring to was the payment of the indebtedness—

A. Of the \$75,000.00 note less some payments. I think the note was down to sixty thousand and it was—the composition was for \$29,250.00. So that there was a gain of some \$31,000.00 to Mr. Kerry there, and also the recovery of the insurance money from Lake Stevens wiped out a good many obligations that he was personally liable for and returned him a small amount, I think \$3,700.00 more than had previously been written off as a bad debt.

So the—and also in July 31st, the books did not give effect to this settlement of John X. Johnson. They still showed it as an outstanding obligation. His books were not always closed. The accountants who handled these affairs sometimes would let them go a month or two before they would get out a statement. So, we have used here—or I have used, rather, by selection this statement of August 31st, [66]

(Testimony of Joseph R. Schneider.)

1952, which shows the net worth of Mr. Kerry. This is a personal statement.

To begin with, in his background, you have to consider that Mr. Kerry was in the nature of a holding company. He was—he treated the H. E. Kerry Company as a separate entity, then he had his personal affairs, then the H. E. Kerry Company and he personally made investments in various corporations which he did business with. So that these investments were not the best evidence of his net worth, but the values of the—the net worth of the companies in which he had invested were in a customary accounting practice would be taken up as the values and not his investment. In other words, it's an example; in the Wendell Pine on this date, August the 31st—

Mr. Grunke: Maybe we'd better—I'm wondering what the materiality of all this might be for this hearing. I don't want to cut anybody short, but if we're going to go into a long accounting explanation that may not be material, I'd like to question it.

Mr. Krause: If we are only disposing of the question concerning the validity of the so-called pledge of December 30th, 1952, that would not be material. We've taken the position that Mr. Kerry was [67] insolvent on that date and that Mrs. Kerry did not pay for that with her independent separate funds but it was paid with community funds and those transfers should be set aside.

Mr. Grunke: But I mean, does this—and this

(Testimony of Joseph R. Schneider.)

accounting matter that you're going into now, does that particularly relate to those issues?

Mr. Krause: Yes, it shows this insolvency on the 28th day of July, 1952.

Mr. Grunke: But I mean, does it go into these issues as to whether Mrs. Kerry paid for this with her money or somebody else's money?

Mr. Krause: No.

Mr. Grunke: I'm just wondering—as I say, counsel, I don't want to cut anybody short but I'm just wondering what issues you're driving at with this question of solvency or insolvency; whether it's anything that's material to any of the petitions that are set down here today.

Mr. Krause: Well, the only question that we go into is to whether or not this was a proper transfer without consideration at the time the man was insolvent. As a trustee, we're not admitting that there was a good and sufficient consideration paid. We rely on the probable presumption that it was a community [68] property payment.

Now, of course, we don't have any further evidence as to whether or not this was paid in community or separate funds, and if the Court at this time made the finding that it was made from separate funds, this is not material.

Mr. Grunke: Well, I'll object to the questions and this line of evidence has no materiality to the issues here. That there was a good and proper

(Testimony of Joseph R. Schneider.)

transfer; the only uncontroverting evidence of interested and disinterested witnesses.

The Referee: Do you have any further evidence in regard to the separate or community funds?

Mr. Krause: No, I have no further evidence on that point.

The Referee: Do you wish to ask a continuance to investigate the stock or are you going to stand on the testimony of the petitioner's statement that this was purchased from stock she received from her former husband?

Mr. Grunke: We'll certainly be happy to furnish a statement whether you want to stand on it or not. We'll furnish it to you anyway. We don't want to question good faith here. We'll certainly furnish it to you whether you want it or not. [69]

The Referee: The reason I stated that, because my mind is made up and I think I can just give you an oral opinion here at this time, and, of course, in that event, why, this other question will be mute, be immaterial. So, if you wish a continuance first to investigate——

Mr. Krause: Is there any reason that you'd wish a continuance on that point, Mr. Schneider?

The Witness: No, I haven't any reason.

The Referee: Do you wish to be heard on that question?

Mr. Krause: No questions.

The Referee: Do you wish to answer?

Mr. Grunke: No, I think we've made our argument.

(Testimony of Joseph R. Schneider.)

The Referee: At this time the Court, after hearing the testimony on the petition, there's not a scintilla of evidence to the contrary they show—all the testimony of all the parties shows that this pledge is a result of money received by Mrs. Kerry from her former husband and which was her separate property and which was maintained throughout in a separate bank account or was kept separate and never had been commingled with community funds and that the pledge was for a certain consideration; namely, she withdrew this [70] money at the time of the signing the money to the First National Bank she received the assignment of this note and the property was pledged, and also as to the—from the corporation to the partnership, the assignment—releasing the assignment from the corporation to the partnership was a valid consideration; and, therefore the petitioner, Ruth B. Kerry—

Mr. Krause: There are some greater arguments as we go into the pledge. The only thing that I didn't have any argument on as to whether or not this was from a separate or a community fund.

The Referee: Well, the Court will hold that this was from her separate funds and that the pledge is her separate property.

Is that what you mean?

Mr. Krause: I do question the validity of the pledge, whether or not there was sufficient delivery in order to constitute a pledge of the property.

The Referee: Well, I haven't ruled on that point yet.

(Testimony of Joseph R. Schneider.)

Mr. Krause: Yes.

The Referee: I mean, I just—the pledge was given to her and the pledge to her is her separate property. Now, if there's any question of whether the [71] pledge is legal or valid in bankruptcy, do you wish to be heard on that question——

Mr. Krause: That's right.

The Referee: ——in regards to the notice?

Mr. Krause: Yes.

The Referee: I mean, I'm just ruling on that now to save your testimony because that would be immaterial, it would only be an immaterial question. In other words, this whole question is now is whether it complies with the '52 Amendment, the minutes of the Bankruptcy Act requiring notice.

Is that what you have in mind?

Mr. Krause: Requiring notice?

Mr. Grunke: Requiring perfections of the transfer.

Mr. Krause: Yes, requiring perfections.

Mr. Grunke: Well, I suppose I have the—do you want me to proceed in view of the fact that I'm the petitioner, or would you prefer to do it the other——

Mr. Krause: That's all right.

Mr. Grunke: ——way around? Which would be more convenient to the Court and counsel is perfectly all right with me. I can start or you can start.

The Referee: I think it would be proper, I believe, to hear first the petitioner. [72]

(Witness excused.)

Mr. Grunke: If the Court please, it has been established——

Mr. Krause: One thing further. I think you'll stipulate that there is nothing filed with the Secretary of State or with any other instrumentality for giving the statutory notice.

Mr. Grunke: That is correct and I so stipulate.

Also, I'd like to call Mr. Kerry, have Mr. Kerry back on this one—or perhaps we can stipulate this, too, or I can have him testify. But a question I forgot to ask him and that is: that the certificates, stock certificates, in 1952 were actually turned over to Mrs. Kerry from the bank. The endorsed certificates together with the other documents, is that correct? The stock certificates that were pledged to you in July of '52, did the bank turn those over to you when you picked up the pledge?

Mrs. Kerry: Yes.

Mr. Kerry: I don't know anything about that.

(Whereupon argument was given by respective Counsel.)

The Referee: The Court's never had an [73] opportunity to have a pledge of a partnership before. So, now I'll be honest with you, I'm not sure of myself.

You've got three things here you're talking about; one is a mortgage, another is an assignment and a pledge. Now, they're all different.

Mr. Grunke: Yes, I say, I'll mention something on that.

The Referee: In most of these you're talking of

an assignment. An assignment is a whole lot different. If Mr. Kerry had given his wife an assignment of her interest, she would actually own the interest and he would have nothing more to do with it. It's a lot different, an assignment which he refers to in most of these cases.

The question in my mind of whether—I'm not positive, I say—of whether a partnership interest is capable of being pledged or whether it has to be mortgaged with reference to creditors. Whether it's in the basis of accounts receivable as our Supreme Court ruled here in *Klauder versus Corn Exchange*——

Mr. Grunke: The Corn Exchange.

The Referee: The Corn Exchange case, whatever comes in that category. One would have to give some notice to creditors. In that case the Court held that you had to give notice to creditors. And, [74] of course in our case, state here we had no place you could give notice. You could file with the Secretary of State but at that time there was no such thing where you could give a notice. But, however, that is a bankruptcy case, the act has been amended.

Mr. Grunke: That's right.

The Referee: I don't know as Counsel stated that you can pledge this partnership interest. Ordinary effect you'd have to give possession of this, but if it's incapable and there's a possibility of how you're going to turn over a pledge to an interest in a partnership any more than he may hand him here your partnership agreement—or your interest

in a partnership agreement. What would be true there, so, I'm taking it under advisement and I'll appreciate it or allow either party 10 days, or I'll put it this way—it's your petition, I'll allow you—is 10 days sufficient or do you wish——

Mr. Grunke: I'd like to suggest this, if the Court please, and it's just a suggestion, I'll do whatever the Court states. As the Court's noticed, it's our petition when we get down to the legal arguments I'm somewhat at a loss until I hear counsel's argument, as to just what his attack is going to be. I think we have made a *prima facie* case of an assignment which on [75] it's face is purportedly that of—and we might save time, in fact, I think we might have saved time this afternoon if counsel had argued first and me second. My opening remarks were quite general and had to be——

The Referee: Well, I don't think there's much merit, it's only the two questions here first. There's not too much, but I say I'm not positive of it. Whether a partnership interest is capable of being——

Mr. Grunke: Sure.

The Referee: ——capable of being pledged——

Mr. Grunke: Oh, yes.

The Referee: ——or whether it must be under, more—if there's any notice required. And whether it comes under the Corn Exchange case as recalled.

Mr. Grunke: If the Court please, I think 10 days on those two points would be very ample.

The Referee: I will give you 10 days and will give you 10 days in which to answer it then. After

you received his copies or authorities, whichever it is.

Anything further?

The Court will stand adjourned. [76]

Certificate

I, Gerald E. Cole, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ GERALD E. COLE,
Reporter.

[Endorsed]: Filed June 15, 1954. [77]

In the United States District Court, Western
District of Washington, Southern Division

In Bankruptcy No. 15920

RUTH B. KERRY,

Petitioner-Appellant,

vs.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy
of Harold Edwin Kerry and the Community of
Harold Edwin Kerry and Ruth B. Kerry, His
Wife,

Appellee.

In the Matter of

HAROLD EDWIN KERRY and the Community
of HAROLD EDWIN KERRY and RUTH
B. KERRY, His Wife,

Bankrupts.

CERTIFICATE OF CLERK
TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the above-entitled
Court, do hereby certify that pursuant to the pro-
visions of Rule 75(o) of the Federal Rules of Civil
Procedure as amended, and Subdivision 1 of Rule
10 as amended, of the United States Court of Ap-
peals for the Ninth Circuit, I am transmitting here-
with such of the original papers, pleadings and
exhibits in the above-entitled cause as are designated

by the written Designation of the Appellant and the Cross-Designation of the Appellee herein, and the said papers, pleadings and exhibits herewith transmitted constitute the Record on Appeal from that certain Order of the Referee in Bankruptcy for the above District and Division, filed and entered on June 11, 1954, from which said Order a Petition for Review was filed in the said District Court; and from that Final Order of the above-entitled District Court, filed and entered on August 12, 1954, with respect to the said Order of the Referee, to the United States Court of Appeals for the Ninth Circuit, at San Francisco, California, and are identified as follows:

1. Petition to Have Trustee Abandon Burden-some Asset and Permit Petitioner to Foreclose Pledge (filed by Referee Feb. 4, 1954).

2. Petition of Trustee to Have Referee Determine Title to Property and Require Persons in Possession to Turn Property Over to Trustee (filed by Referee Mar. 1, 1954).

3. Notice of Hearing Trustee's Petition to Void All Pledges, Assignments, Notes or Contracts, to Determine Title and Turn-over (filed by Referee Mar. 1, 1954).

4. Reply of Ruth B. Kerry to Petition of Trustee to Have Referee Determine Title to Property (filed by Referee Mar. 15, 1954).

5. Affidavit of Mailing of copy of Reply of Ruth B. Kerry (filed by Referee Mar. 15, 1954).

6. Memorandum Decision of O. M. Pitzen, Ref-

eree in Bankruptcy (filed by Referee May 11, 1954).

7. Motion on behalf of Ruth B. Kerry for Rehearing (filed by Referee May 14, 1954).

8. Findings of Fact and Conclusions of Law of O. M. Pitzen, Referee in Bankruptcy (filed by Referee June 11, 1954).

9. Order of O. M. Pitzen, Referee in Bankruptcy (filed by Referee June 11, 1954).

10. Petition for Review (filed by Referee June 15, 1954).

11. Affidavit of Mailing of copy of Petition for Review (filed by Referee June 15, 1954).

12. Referee's Certificate on Review (filed in Dist. Court June 17, 1954).

12a. Memorandum Decision of District Judge George H. Boldt (filed July 30, 1954).

13. Order of District Court denying Petition for Rehearing (filed Aug. 12, 1954).

14. Notice (of Ruth B. Kerry) of Appeal (filed Sept. 9, 1954).

15. Bond on Appeal (filed Sept. 9, 1954).

16. Statements of Points upon which Appellant Will Rely (filed Sept. 10, 1954).

17. Appellant's Designation of Record on Appeal (filed Sept. 10, 1954).

18. Affidavit of Service of Designation, etc. (filed Sept. 10, 1954).

19. Reporter's Transcript of Proceedings before Referee on March 18, 1954 (filed by Referee June 15, 1954).

19a. Appellee's Cross-designation of Record on Appeal (filed Sept. 15, 1954).

20. Motion for Transmittal of Original Exhibits (filed Sept. 17, 1954).

21. Order Directing Transmittal of Original Exhibits (filed Sept. 20, 1954).

22. Proof of Claim in Bankruptcy, of Ruth B. Kerry (filed by Referee Apr. 20, 1954).

I further certify that as part of the Record on Appeal I am transmitting herewith the following original exhibits, to wit:

Petitioner's Exhibits Nos. 1-10, inclusive (being a part of the Referee's Certificate on Review) (see Item 12).

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the parties hereto for the preparation of the Record on Appeal in this cause, to wit: Notice of Appeal, Petitioner Ruth B. Kerry: \$5.00, and that said fee has been paid to the Clerk by the said Petitioner.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court, at Tacoma, Washington, this 27th day of September, 1954.

[Seal]

MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

[Endorsed]: No. 14533. United States Court of Appeals for the Ninth Circuit. Ruth B. Kerry, Appellant, vs. Joseph R. Schneider, Trustee in Bankruptcy of Harold Edwin Kerry and the Community of Harold Edwin Kerry and Ruth B. Kerry, His Wife, Bankrupts, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed September 29, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14533

RUTH B. KERRY,

Petitioner-Appellant,

vs.

JOSEPH R. SCHNEIDER, Trustee in Bankruptcy
of Harold Edwin Kerry and the Community of
Harold Edwin Kerry and Ruth B. Kerry, His
Wife,

Appellee.

In the Matter of

HAROLD EDWIN KERRY and the Community
of HAROLD EDWIN KERRY and RUTH B.
KERRY, His Wife,

Bankrupts.

STATEMENT OF THE POINTS UPON WHICH
APPELLANT WILL RELY

1. Appellee (Trustee in Bankruptcy) is not entitled to recover, as an asset of the bankrupt estate, the partnership interest which had belonged to Harold Edwin Kerry, bankrupt, in that certain partnership known as West Tenino Lumber Company, for the reason that the same had, more than nine (9) months prior to bankruptcy, been assigned to Appellant; and an order should have been entered granting the petition of Appellant (Ruth B. Kerry, Petitioner) to have her interest in the said

partnership interest recognized, to order that the said Trustee and the said bankrupt estate have no interest in the said partnership interest, and otherwise grant Appellant's petition, because

(a) said partnership (see the partnership agreement, Exhibit "6" herein) was a partnership organized and existing within the State of Washington, and is governed by Washington law; and, under Washington law, Appellant had acquired all of the right to the said partnership interest of the bankrupt more than nine (9) months prior to the filing of the Petition in Bankruptcy by Harold Edwin Kerry in the above Cause, by virtue of an assignment by bankrupt of the said partnership interest to Appellant for a good and valuable consideration; and the statutes of the State of Washington with respect to partnerships and partnership rights expressly permit and provide for the assignment of the same;

(b) the aforesaid assignment of partnership interest was made by instrument in writing (Exhibit "9") executed by the above-named bankrupt and delivered to Appellant on the date that the said assignment was made, and the partners other than bankrupt were advised thereof; said assignment was pursuant to an agreement of even date therewith (Exhibit "4");

(c) the assignment aforesaid by bankrupt to Appellant was as security for a loan in the sum of Twenty-nine Thousand Two Hundred Fifty Dollars (\$29,250.00), together with interest thereon,

pursuant to the terms of a promissory note (Exhibit "2"), and, as of the date of bankruptcy, the entire sum owing upon the said note, together with all accrued interest thereon, was due and payable, and unpaid, and the value of the said partnership interest was less than the sum owing upon the said note;

(d) under the law of the State of Washington, the rights of Appellant with respect to the said partnership interest are superior to the rights of a trustee in bankruptcy; and, under Washington law, at no time subsequent to the making of the assignment could a lien upon such partnership interest obtainable by legal or equitable proceedings on a simple contract become superior to the rights of Appellant (assignee);

(e) at the date of bankruptcy, no creditor of bankrupt could have obtained a lien by legal or equitable proceedings upon the said partnership interest which would be superior to the rights of the Assignee-Appellant; and

(f) Appellant (Ruth B. Kerry, Petitioner) is entitled to the aforesaid partnership interest of bankrupt and Appellee (Trustee in Bankruptcy) is not entitled to the said interest, nor to any rights therein.

2. It was error to enter the Final Order, entered by the District Court in the above matter on the 12th day of August, 1954, denying Appellant's motion for a rehearing, denying Appellant's Peti-

tion for Review of the Findings of Fact, Conclusions of Law and Order of the Referee in Bankruptcy, dated June 11, 1954, and affirming the said Findings of Fact and Conclusions of Law and Order of the said Referee in Bankruptcy, dated June 11, 1954, for the reason that the said Order of the said Referee in Bankruptcy and the said Findings of Fact and Conclusions of Law are in error in the following respects:

(a) In stating in Finding of Fact No. III that, at the time of filing of the Bankruptcy Petition herein, the assets of the bankrupt totalled \$39,974.89, and that one of said assets of the bankrupt was a 45/88ths interest in a partnership known as West Tenino Lumber Company (which conclusion is not supported by the record herein and is contrary to the remaining findings of fact, which establish that the said partnership interest was assigned to Petitioner (Appellant); and which, furthermore, is a conclusion of law and not properly a finding of fact); and in stating in said Finding of Fact No. III that the value of the said 45/88ths interest as of the date of the filing of the Bankruptcy Petition was \$22,000.00.

(b) In making Conclusion of Law No. I, stating that the interest of Harold Edwin Kerry in the said partnership is an asset of the bankrupt estate, for the reason that the said Conclusion of Law is contrary to the findings herein which establish that said interest was assigned to Petitioner (Appellant).

(c) In making Conclusion of Law No. II, stating that the assignment of the said partnership interest is an incomplete pledge of an open book account and not effective as against the Trustee in Bankruptcy (Appellee herein), and that the said Trustee takes title to the said partnership interest free of any rights of Appellant-Assignee, for the reason that the said conclusions are contrary to the findings of fact herein which establish that the transaction was not a pledge of an account receivable, but an assignment of partnership interest to Petitioner (Appellant).

(d) In making Conclusion of Law No. III, stating that the 45/88ths interest of the bankrupt in the partnership is not a burdensome asset of the estate and that the Petition of Ruth B. Kerry (Appellant herein) should be denied, for the reason that the findings of fact establish that the said Petition should be granted, that the debt secured by said assignment exceeds the value of said partnership interest, and there is no asset value in the said partnership interest for the estate herein; and for the reason that the said conclusions are not supported by the findings of fact or by the record herein.

(e) In making Conclusion of Law No. IV, stating that, upon the dissolution of the aforesaid partnership, the Appellee, Trustee in Bankruptcy, shall be entitled to receive all of the right, title and interest in and to assets distributed as a result of liquidation of the 45/88ths interest which Harold

Edwin Kerry had assigned to Petitioner, Ruth B. Kerry (Appellant) for the reason that the findings of fact establish that Appellant is entitled, by virtue of the assignment and the Uniform Partnership Act, to the assets or proceeds of the said 45/88ths interest until she has received the sum of \$29,250.00, together with the interest on the note evidencing the same, and such other relief as the note provides, that the said 45/88ths interest is of a lesser value than the said sum of \$29,250.00, and that the Trustee consequently has no interest therein; and for the reason that the said conclusions of law are not supported by the findings of fact or the record herein.

(f) In making Conclusion of Law No. V, stating that the effect of granting the Petition of Ruth B. Kerry (Appellant) recognizing her rights under the assignment of the said partnership interest would be to enable her to obtain a greater percentage of her debt than some other creditor of the same class, for the reason that the assignment of the partnership interest conveyed to the Appellant a property right and made her a secured creditor, and for the further reason that there are no findings of fact and there is nothing in the record herein to support any such conclusions as appear in Conclusion of Law No. V.

(g) In making any and all other conclusions of law (whether in the form of Conclusions of Law or purportedly in the form of Findings of Fact) stating expressly or in effect that the assignment by bankrupt to Appellant of the aforesaid partner-

ship interest was not completed as required by law of the State of Washington or that any dominion or control of the same was retained by bankrupt assignor contrary to law, or that any other act or condition not actually performed was required by Washington law in order to make the assignment valid and effective either as against a third person other than a buyer in the ordinary course of trade, or as against a subsequent lien upon such partnership interest obtainable by legal or equitable proceedings on a simple contract.

3. It was error to enter the Final Order made in the above Cause by the District Court on the 12th day of August, 1954, as aforesaid, and error for the said District Court to affirm the Findings of Fact, Conclusions of Law and Order of the Referee in Bankruptcy, for the reason that the said Referee and the said District Court erred in failing to enter conclusions of law and an order stating substantially as follows:

(a) That on the date of the filing of the Bankruptcy Petition in the above-entitled Cause, Harold Edwin Kerry was a partner in the partnership known as West Tenino Lumber Company and had theretofore, for good and valuable consideration, assigned his interest in the said partnership to Petitioner, Ruth B. Kerry (Appellant), and that any interest which the said Harold Edwin Kerry had in the said partnership was as of the date of the filing of the said Bankruptcy Petition, subject to the said assignment.

(b) That the aforesaid assignment of partnership interest from H. E. Kerry to Appellant is a valid and effective assignment and is a transfer so far perfected as to be valid and effective as against the Trustee in Bankruptcy herein, and that the rights of Appellant under and by virtue of the said assignment of partnership interest are superior to the rights of the Trustee (Appellee) herein.

(c) That the value of the said 45/88ths interest in the aforesaid partnership was, as of the date of the filing of the Bankruptcy Petition in the above-entitled Cause, and now is substantially less than the principal sum of \$29,250.00 owing to the Appellant, and consequently, the estate has no interest in the said partnership which is of any value, and that to attempt to administer the said interest in the partnership would be burdensome to the estate.

(d) That the petition of Ruth B. Kerry (Appellant) should be granted and that the Trustee (Appellee) should be directed to abandon any claimed interest in the aforesaid partnership and that the Appellant be authorized and permitted to acquire by assignment and bill of sale from a bankrupt, by foreclosure of the said assignment, or otherwise, in any court of competent jurisdiction other than this Court of Bankruptcy, all interest in the said 45/88ths interest in the aforesaid partnership.

(e) That the Referee erred in failing to enter an order: Granting the Petition of Appellant, Ruth B. Kerry, authorizing and directing the Appellee, Trustee in Bankruptcy herein, to abandon any claim

with respect to the aforesaid partnership for the reason that the same would be burdensome to the estate, and authorizing Appellant to acquire, by further assignment and bill of sale from the bankrupt, foreclosure or otherwise, in any court of competent jurisdiction other than this Court of Bankruptcy, all interest in and to the said 45/88ths interest in the aforesaid partnership.

4. It was error for the District Court to refuse to enter an order upon the aforesaid Petition for Review, overruling the Order of the Referee in Bankruptcy, dated June 11, 1954, and directing the entry of Conclusions of Law and of an Order as prayed for by the said Petitioner (Appellant herein) and as set forth hereinabove.

BOGLE, BOGLE & GATES,

/s/ ARTHUR G. GRUNKE,

Attorneys for Appellant.

[Endorsed]: Filed September 29, 1954.